

CARD 4

35

No. 35 Orig.

TITLE United States of America, Plaintiff,
v.
States of Maine, et al.

DOCKETED	COURT
April 1, 1969	Bill of complaint
DATE	PROCEEDINGS AND ORDERS
Jan. 11, 1977	Joint motion for supplemental proceedings and for appointment of Special Master to determine the coastline of the Commonwealth of Massachusetts filed.
Jan. 19, 1977	Above joint motion DISTRIBUTED. 2-18
Jan. 25, 1977	Order extending time to file response to government's motion for supplemental proceedings until Feb. 16, 1977.
Feb. 16, 1977	Objection to motion for supplemental proceedings and for appointment of Special Master to determine the coastline of the State of Rhode Island filed.
Feb. 17, 1977	Motion for supplemental proceedings and for appointment of Special Master to determine coastline of the State of Rhode Island DISTRIBUTED. 3-4;
June 20, 1977	Above motion REDISTRIBUTED. 6-23
June 25, 1977	Motions for supplemental proceedings REDISTRIBUTED.(final)
June 29, 1977	Ordered that the Hon. Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, is appointed Special Master in this case.
July 11, 1977	Oath of Special Master filed.
May 26, 1981	Report of the Special Master filed.
May 26, 1981	Waiver of the United States and Massachusetts to file exceptions to Report of Special Master filed.
May 27, 1981	DISTRIBUTED. 6-11. (Report of Special Master).
June 15, 1981	The Report of the Special Master (Massachusetts Boundary Case) is received and order filed. Supplemental decree entered. Marshall, J., OUT...
Jan. 13, 1984	Report of the Special Master on the Rhode Island/New York boundary filed.
Jan. 18, 1984	DISTRIBUTED. 2-17 (Above report of the Special Master).
Feb. 21, 1984	The Report of the Special Master on the Rhode Island boundary is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days.
May 7, 1984	Exceptions to the Report of the Special Master filed by the United States.
	(Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
May 9, 1984	Exceptions to the Report of the Special Master filed by Rhode Island.
May 10, 1984	Exceptions to the Report of the Special Master filed by New York.
June 7, 1984	Reply brief filed by United States to the Rhode Island and New York Exceptions.
June 11, 1984	Reply brief filed by New York to the U. S. Exceptions.
June 18, 1984	Brief amicus of Alaska in opposition to The Exceptions of the United States.
June 15, 1984	DISTRIBUTED. June 21, 1984. (Motions of Rhode Island New York and United States).
June 22, 1984	DISTRIBUTED. 6-28. (Exceptions to Report of the Special Master by New York, United States and Rhode Island)
June 22, 1984	Reply brief by Rhode Island filed.
July 5, 1984	The Exceptions to the Report of the Special Master are set for oral argument in due course.
July 14, 1984	Motion of New York and Rhode Island for divided argument filed.
Aug. 23, 1984	The motion of New York and Rhode Island for divided argument is GRANTED.
Oct. 19, 1984	CIRCULATED.
Nov. 26, 1984	ARGUED.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, et al (RHODE ISLAND, NEW YORK),

Defendants.

REPORT OF THE SPECIAL MASTER

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8 folios

WALTER E. HOFFMAN
Special Master
425 U. S. Courthouse
Norfolk, Virginia 23510

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, et al (RHODE ISLAND, NEW YORK),

Defendants.

REPORT OF THE SPECIAL MASTER

I. INTRODUCTION

The issue to be decided in this Supreme Court original jurisdiction proceeding is the location of the legal coastline of the United States in the area of the eastern end of Long Island Sound and Block Island Sound. The resolution of this issue turns specifically on whether Long Island Sound and Block Island Sound comprise a bay under the terms of the Convention on the Territorial Sea and Contiguous Zone.

In *Warner v. Replinger*, 397 F.Supp. 350 (D.R.I. 1975), the plaintiffs, pilots of foreign flag and American registry vessels who were licensed by Connecticut, challenged a Rhode Island statute which requires every foreign vessel and every American vessel under register for foreign trade that traverses Block Island Sound to take on a pilot licensed by the

Rhode Island Pilotage Commission. The District Court in that case concluded that the issue to be decided was whether the Rhode Island statute was authorized by 46 U.S.C. § 211, which authorizes states to regulate the use of pilots "in bays, inlets, rivers, harbors, and ports of the United States. . . ." 397 F.Supp. at 351, 359. Resolution of the issue, according to the District Court, turned on whether Block Island Sound was a bay, inlet, river, harbor, or port as contemplated by the federal statute. *Id.* The District Court looked to the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. 5639, for a definition of what constitutes a bay, found Long Island Sound and Block Island Sound to be a bay, and consequently upheld the Rhode Island statute. 397 F.Supp. at 353-56. The First Circuit affirmed the decision of the District Court finding the waters of Long Island Sound and Block Island Sound to be a bay. *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). On June 26, 1976, a petition for a writ of certiorari was filed with the Supreme Court. *Ball v. Dunlap*, Docket No. 75-6990.¹

In December, 1976, apparently in response to the litigation concerning the Rhode Island pilotage statute, the United States filed a Motion for Supplemental Proceedings in this case, *United States v. Maine, et al.*, No. 35 Original, to determine the coastline of Rhode Island. On June 29, 1977, the undersigned was appointed to serve as Special Master in this proceeding. 433 U.S. 917 (1977).²

Rhode Island was the only state designated as a defendant by the United States in its complaint to determine the coast-

¹ The petition for a writ of certiorari is still pending before the Supreme Court.

² In January, 1977, the United States and the Commonwealth of Massachusetts moved jointly for supplemental proceedings in *United States v. Maine, et al.*, to resolve a controversy regarding the coastline of Massachusetts. The June 29, 1977, order of reference of the Supreme Court referred both disputes to the undersigned. The Rhode Island proceedings were separated from the Massachusetts proceedings when it became clear that the two disputes involved different issues.

line of Rhode Island. On October 20, 1978, the Special Master, acting *sua sponte*, advised the Attorneys General of the states that were the named parties in *United States v. Maine, et al.*, of the pendency of these supplemental proceedings and their potential interest therein. On November 14, 1978, New York responded expressing a "possible interest" in the proceedings and reserving their right to be active in the proceedings at some later time. In September, 1981, after the United States and Rhode Island had completed discovery, New York filed a Motion to Intervene in these proceedings. On October 8, 1981, the Special Master determined that New York was already a party to this action and granted New York leave to participate.³

After the parties submitted pre-trial briefs setting forth their contentions, evidentiary hearings were held on November 9 through 13, 1981, in Providence, Rhode Island, and on January 12 and 13, 1982, in Norfolk, Virginia. Subsequent to the evidentiary hearings the parties submitted simultaneous post-trial briefs and post-trial reply briefs. Oral argument was heard on May 14, 1982, in Norfolk, Virginia, after which the parties submitted short post-oral argument memoranda.

The basic issue to be determined in this proceeding is the location of the legal coastline of the United States, the State of Rhode Island and the State of New York in the area of the eastern end of Long Island Sound and essentially all of Block Island Sound. The legal coastline, also called the baseline, is the point from which the territorial sea and a state's jurisdiction under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, is measured, and marks the seaward limit of a state's internal waters separating these waters from the territorial sea. See *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969); *United States v. California*, 381 U.S. 139 (1965). See also *United States v. California*, 382 U.S. 448, 450 (1966).

³ New York agreed that it was not necessary to conduct further discovery before the case could proceed.

Rhode Island and New York assert that the waters of Long Island Sound and Block Island Sound landward of baselines (or closing lines), connecting Montauk Point on Long Island with Block Island and Block Island with Point Judith, Rhode Island, comprise a bay and are thus internal state waters.⁴ The United States asserts that the waters of Block Island Sound are not part of a bay but instead are territorial waters and high seas, and that the legal coastline is the ordinary low water line along the mainland and around Block Island.⁵

If Block Island Sound and Long Island Sound are a bay as asserted by Rhode Island and New York, Block Island Sound would be internal state waters and the legal coastline would be drawn in accordance with the submission of the states. If Block Island Sound, however, is not part of a bay, the waters of Block Island Sound would be territorial waters and high seas and the legal coastline would be drawn essentially in accordance with the submission of the United States. Thus,

⁴ Rhode Island asserts in its Answer and Counterclaim that the coastline for Rhode Island is:

the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, than a straight closing line from Sakonnet Point west to Point Judith, then a straight closing line south to Sandy Point on Block Island, then the ordinary low water line along the Block Island shore clockwise, to a point along a straight closing line to Montauk Point on Long Island, State of New York

⁵ The United States submits in its Second Amended Complaint that:

The coastline of Rhode Island is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

[T]he coast of the State of Rhode Island, except as to Block Island, is the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, then a straight closing line across Narragansett Bay to Point Judith, then the ordinary low water line along the mainland to the Connecticut border. As to Block Island, the coast of the State of Rhode Island is the ordinary low water line around Block Island. . . .

the resolution of this issue turns specifically on whether the waters of Long Island Sound and Block Island Sound comprise a bay.

II. CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE

The Supreme Court has directed, and the parties to this proceeding agree, that the courts will use the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1607, T.I.A.S. 5639 [hereinafter the Convention], to define inland or internal waters. *United States v. Louisiana*, 394 U.S. 11, 17-35 (1969); *United States v. California*, 381 U.S. 139, 161-67 (1965). In both *United States v. California*, 381 U.S. at 163-65, and *United States v. Louisiana*, 394 U.S. at 21, the Supreme Court recognized that the Convention provides "the best and most workable definitions available" for defining inland waters, such as bays. These decisions also indicate that the Convention should be used for all purposes where it is necessary to define inland waters and the legal coastline, so the United States will have a single coastline established for domestic purposes and international relations. *United States v. Louisiana*, 394 U.S. at 34-35; *United States v. California*, 381 U.S. at 165. Thus, in this proceeding, the Convention will be applied to resolve the issues.

The Convention sets forth the following Articles with respect to the location of the coastline, which is referred to as the baseline in the Convention.

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide of its banks.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

In regard to islands, Article 10 of the Convention provides:

Article 10

1. An island is a naturally formed area of land, surrounded by water, which is above water at high-tide.
2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Other Articles of the Convention provide guidelines for determining the baseline for unique geographic coastal formations. First, Article 7 establishes criteria for drawing the baseline of "bays." Article 7(1) states that the Article applies "only to bays the coasts of which belong to a single State." Articles 7(2) through 7(5) set forth criteria for determining what constitutes a "juridical bay" and for positioning the baseline of such a bay. Second, Article 7(6) states that the criteria needed for a juridical bay do not apply to "historic" bays, thus recognizing that a historic claim may qualify a body of water as a bay and internal waters. Lastly, Article 4 allows coastal States to draw "straight baselines" to enclose coastal water formations, where a coast is deeply indented and cut into, and where there is a fringe of islands along the coast. The Supreme Court, however, has stated that the decision to use Article 4 "rests with the Federal Government, and not with the individual States." *United States v. California*,

381 U.S. at 168; *United States v. Louisiana*, 394 U.S. at 72. Thus far, the Federal Government has not elected to apply the straight baseline system to the coasts of the United States. Accordingly, the straight baseline system of Article 4 is not applicable in this proceeding.

III. POSITIONS OF THE PARTIES

The United States relies on Article 3 and Article 10(2) of the Convention to support their position in this proceeding. The United States contends that the normal baseline rule of Article 3 should be employed to draw the baseline of Block Island Sound along the mainland from Point Judith to the Connecticut border. With respect to Block Island and Long Island the Government claims that Article 10(2) applies and the baseline is the low water line around the islands. The United States admits that the waters of Long Island Sound are historic internal waters and asserts that they should be closed by baselines across the Race entrance at the eastern end of Long Island Sound, from Orient Point on Long Island to Plum Island, from Plum Island to Race Point on Fishers Island, and from Fishers Island to Napatree Point, Rhode Island.⁶

Rhode Island and New York rely solely on Article 7 of the Convention for a determination in this proceeding of whether the waters of Block Island Sound are internal state waters. Based on Article 7 the States take two separate and distinct approaches to the issue. One approach is based on the savings clause of Article 7(6) and involves a claim by the States that Block Island Sound, or at least part of it, constitutes historic internal waters. The other approach is based on the juridical bay test of Articles 7(2) through 7(5).

⁶ See U.S. Post-Trial Opening Brief at 11-12, 30, 36; Dolan, Nov. 9, 1981, at 45-46, 53-54, 59. See also Appendix C.

It is clear from the Convention that a body of water can be a historical bay without conforming to the geographic tests required for a juridical bay. *See United States v. Louisiana*, 394 U.S. at 75 n.100. Consequently, if Block Island Sound is entitled to historic bay status the waters of Block Island Sound are internal state waters and it would then not be necessary to determine whether the Sound is a juridical bay. Accordingly, the historic bay claim will be examined first.

IV. HISTORIC BAY DISCUSSION

The States claim that Block Island Sound is historic internal waters based on Article 7(6) of the Convention, which provides:

The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

In *United States v. Alaska*, 422 U.S. 184 (1975), the Supreme Court elaborated on what was needed to establish a historic claim. The Court stated:

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. California*, 381 U.S. at 172. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority. *Louisiana Boundary Case*, 394 U.S., at 75 and 23-24, n. 27.

422 U.S. at 189.

The Court went on to explain, with regard to the first factor, that to establish a historic claim the exercise of authority must be of a particular kind of authority. That is "the exercise of sovereignty must have been, historically an assertion of power to exclude all foreign vessels and navigation." *Id.* at 197. The Court has also pointed out that the authority exercised must be commensurate in scope with the nature of the title claimed. *Id.* See also *United States v. Louisiana*, 394 U.S. at 24-26.⁷

The second factor will be satisfied if the exercise of authority continued for a considerable time, such that it developed into a usage. See *United States v. Louisiana*, 394 U.S. at 23-24 n.27.

With regard to the third factor, acquiescence by foreign nations, the Supreme Court stated:

Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See *Juridical Regime of Historic Waters, Including Historic Bays*, 2 Yearbook of the International Law Commission, 1962, pp. 1, 16-19 (U.N. Doc. A/CN.4/143). The Court previously has noted this division but has taken no position in the debate. See *Louisiana Boundary Case*, 394 U.S., at 23-24, n. 27. In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or

⁷ In *United States v. Louisiana*, the Court stated:

Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea the area would be territorial sea." *Juridical Regime of Historic Waters, Including Historic Bays*, [2 Y.B. Int'l Law Comm'n [23 [U.N. Doc. A/CN.4/143 (1962)].

reasonably should have known of the authority being asserted.

United States v. Alaska, 422 U.S. at 200.

From the above analysis, it is clear that there are three criteria that must be met to establish a historic claim to a body of water. First, the claiming nation or state must have exercised sovereign authority over the area with respect to its local citizens and foreign nations. Second, the exercise of authority must have been continuous over a period of time. Last, the governments of the foreign nations must have known of the authority being asserted and acquiesced in the exercise of authority or reasonably should have known of the exercise of authority.

In *United States v. California*, the Supreme Court stated the following with regard to establishing a historic claim:

The United States claims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was *clear beyond doubt*. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

381 U.S. at 175 (emphasis added). In *United States v. Louisiana*, the Court adopted this language and continued:

Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is con-

clusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title.

394 U.S. at 77.

Thus, the initial inquiry in the historic bay analysis is to determine whether the United States has disclaimed any intention on its part to establish Block Island Sound as historic inland waters. If such a disclaimer is found, then the States must present evidence supporting their claim that Block Island Sound is historic inland waters, which is "clear beyond doubt." See Report of the Special Master, *United States v. Louisiana*, No. 9, Original, 13-22, July 31, 1974.

A. DISCLAIMER OF HISTORIC TITLE BY THE UNITED STATES

In 1971, the United States published a series of charts of the United States coastline delimiting the baseline and the territorial seas. Through these charts, the United States furnishes to foreign nations their position with respect to delimitation of the coastline of the United States. These charts included one which covered the entire Long Island Sound and Block Island Sound Area. See Appendix C.⁸ Upon examination of this chart, it is apparent that the position of the Government in 1971 is identical to the position of the Government in this proceeding.

The Special Master determines, that the United States has sufficiently disclaimed any historic title to, or sovereign jurisdiction over, the entire Block Island Sound area. Accordingly, the burden is on the States to prove by evidence that is "clear beyond doubt" that Block Island Sound is historic internal waters and overrides the federal disclaimer of historic title.

⁸ Hugh Dolan testified that U.S. Ex. M-2 (Chart 13205), a copy of which is reproduced in Appendix C, is an accurate reproduction of the original nautical chart C&GS 1211, 15th ed., Aug. 2, 1969, that had the baseline claimed by the United States delimited on it. Dolan, Nov. 9, 1981, at 43-45.

B. EVIDENCE OF A HISTORIC CLAIM

1. Regulation of Fishing

The evidence that Rhode Island and New York rely on to support their historic claim can be grouped into three categories. The first category of evidence relates to the enforcement of New York Marine Fishery laws. Arthur Christ, a supervisor with the New York State Environmental Conservation Department, testified that he supervised the enforcement of New York's Fishery Laws in the portion of Block Island Sound that was within the jurisdiction of New York from 1948 to 1976 when he retired. *Christ*, Jan. 25, 1982, at 1,6 (Deposition). Christ testified that he was primarily concerned with enforcing the laws that related to lobsters. *Id.* at 14, 21-22,29. See, e.g., N.Y. Env'tl. Conserv. Law § 13-0329. These laws applied to both residents and non-residents of New York, although there was a restricted area where non-residents could not take lobsters. *Id.* at 6,21. When the lobster laws were violated, such as by taking lobsters without a permit, the person would be apprehended and taken before a New York official on Fishers Island. *Id.* at 14. Christ also testified that patrols in the sound were not on any specific schedule, but were more or less at random, unless there had been complaints in an area in which case the patrols would be continuous. *Id.* at 16-17.⁹ New York argues that its regulation of fishing in Block Island Sound supports a historic claim to the Sound.

In *United States v. Alaska*, the Supreme Court addressed whether fishing regulations can establish historic title to a body of water. The Court stated:

Only one of the fishing regulations relied upon by [Alaska], the Alien Fishing Act, treated foreign ves-

⁹ Jean Gottman also testified that commercial fishing, and "sport" boating and fishing activities are present in Block Island Sound. Gottman, Jan. 12, 1982, at 50, 91. New York asserts that this evidence demonstrates its past and present interest in Block Island Sound and supports a historic claim. The Special Master concludes that this type of evidence does not support a claim of historic inland waters.

sels differently than it did American vessels. That Act, however, did not purport to apply beyond the three-mile limit in Cook Inlet. . . . The remainder of the fish and wildlife regulations . . . clearly were enforced throughout lower Cook Inlet for at least much of the territorial period, but these regulations were not commensurate in scope with the claim of exclusive dominion essential to historic title over inland waters. Each afforded foreign vessels the same rights as were enjoyed by American ships. To be sure, there were instances of enforcement in the lower inlet, but in each case the vessels involved were American. These incidents prove very little, for the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas. . . .

Our conclusion that the fact of enforcement of game and fish regulations in Cook Inlet is inadequate, as a matter of law, to establish historic title to the inlet as inland waters is not based on mere technicality. The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. . . . This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea.

Id. at 197-99. The Court concluded, thus, that fishing regulations that do not discriminate between foreign and domestic vessels, are not, as a matter of law, an exercise of the type of authority that is needed to establish a historic claim. The Court went on to dismiss all the fishing regulations, including the Alien Fishing Act which discriminated against foreign vessels, as establishing a historic claim under the

third factor; acquiescence by foreign nations. The Court stated:

[W]e still . . . disagree with the District Court's conclusion that historic title was established in the territorial period. The court found that the third essential element of historic title, acquiescence by foreign nations, was satisfied by the failure of any foreign nation to protest. . . . In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. . . . We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any claim of dominion. In the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title.

Id. at 199-200.

Based upon the analysis of the Supreme Court in *United States v. Alaska*, the Special Master concludes with respect to the fishing regulations which treat residents and non-residents alike, since they afford foreign nationals the same rights as are enjoyed by Americans, that their enforcement fails to establish the States' historic claim as a matter of law. With respect to the regulations which discriminate between Americans and foreign nationals, the Special Master concludes that the evidence of enforcement fails to establish acquiescence by foreign states and thus does not support any historic claim. The evidence did not include a single incident involving a foreign vessel and thus there is no evidence that any foreign government was ever informed of the States' claim of dominion.

2. Pilotage Statutes

The second category of evidence concerns the regulation of navigation. Both Rhode Island and New York have laws that require ships transiting Block Island Sound to take on a state licensed pilot. The New York statute, N.Y.Nav.Law § 89-b, requires every foreign and American vessel transiting the New York water of Long Island Sound and Block Island Sound to take on a pilot licensed under the laws of New York or the laws of a state with concurrent jurisdiction. Violators of the statute must pay the pilotage as if a pilot had been employed and a violation is a misdemeanor punishable by a fine or imprisonment. The Rhode Island pilotage statute, R.I.Gen. Laws § 46-9.1-1, *et seq.*, is similar to the New York statute in that it requires every foreign vessel and American vessel transversing Block Island Sound to take on a pilot licensed under Rhode Island authority and violators of the statute must pay the pilotage fee and are subject to misdemeanor penalties.

The States argue that the pilotage statutes serve as clear evidence of an assertion of jurisdiction against foreign nations.

In *United States v. Louisiana*, the Supreme Court addressed whether regulation of navigation can give rise to a historic claim. The Court stated:

[I]t is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea. Article 17 of the Convention on the Territorial Sea and the Contiguous Zone embodies this principle in its declaration that "[f]oreign ships exercising the right of innocent passage [in the territorial sea] shall comply with the laws and regulations enacted by the coastal State . . . and, in particular, with such laws and regulations relating to transport and navigation."

Because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters from whose seaward border the territorial sea is measured.

394 U.S. at 24-26.¹⁰

From this analysis in *United States v. Louisiana*, it is clear that reasonable regulation of navigation with respect to safety does not establish a historic claim. Regulation of navigation of that sort is not an exercise of the type of authority that is needed to establish a historic claim.

The Special Master concludes that the Rhode Island and New York pilotage statutes and their enforcement does not support a claim that Block Island Sound should be considered

¹⁰ In a note to this passage the Court stated in part:

Modern authorities are unanimous on this principle. Thus, Jessup states that "[i]t seems clear that even transient vessels must obey reasonable rules and regulations laid down by the littoral state in the interests of safety of navigation and maritime police." And he cites the United States Inland Rules as an example of such regulation of the territorial sea. Jessup, [The Law of Territorial Waters and Maritime Jurisdiction] 121, 122 n.37 [(1927)]. Shalowitz also concludes that the right of innocent passage through the territorial sea "may be conditioned upon the observance of special regulations laid down by the coastal nation for the protection of navigation . . . and other local interests." 1 Shalowitz, [Shore and Sea Boundaries] 23 [1962].

394 U.S. at 24-26 n.29. In another note to the above passage, the Court stated:

The recent United Nations study of the concept of historic waters concluded that "if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea." Juridical Regime of Historic Waters, Including Historic Bays [2 Y.B. Int'l Law Comm'n] 23 [U.N. Doc. A/CN.4/143 (1962)]. Under that test, since the United States has not claimed the right to exclude foreign vessels from within the "Inland Water Line," that line could at most enclose historic territorial waters.

Id. at 26 n.30.

historic internal waters. The pilotage statutes are designed primarily to ensure the safety of navigation and thus are a reasonable regulation of navigation. Additionally, these statutes are applied to American and foreign vessels equally; there is no attempt to exclude foreign traffic under these statutes.

3. Rhode Island-New York Boundary Agreement

The last category of evidence relates to the boundary line between Rhode Island and New York. In 1942, Rhode Island and New York, by agreement, divided the waters of Block Island Sound between themselves. The agreement provides:

We agree that the eastern boundary of New York and the western boundary of Rhode Island shall be and is as follows: Beginning at a point (No. 174) in latitude $41^{\circ}18'16''$.249 and longitude $71^{\circ}54'28''$.477 as determined by the joint commissioners of Connecticut and Rhode Island by a memorandum of agreement dated March twenty-fifth, eighteen hundred and eighty-seven, as such memorandum of agreement is referred to in section 2 of the "State Law" constituting chapter 57 of the Consolidated Laws of the State of New York, thence south $37^{\circ}22'32''$.75 east eighty-five thousand eight hundred one and eighty-nine hundredths feet to a point designated as number 175 and thence in the same direction out to sea to the limits of the territorial waters of the two States. Provided, however, that nothing in the foregoing agreement contained shall be construed to affect existing titles to property corporeal or incorporeal held under grants heretofore made by either of said States.

Taken from H.R.J. Res. 138, 58 Stat. 672 (1944). See Appendix D ("Map of the Boundary Line Between the States of New York and Rhode Island"). The States place great emphasis on the fact that on July 1, 1944, Congress approved the agree-

ment. See H.R.J. Res. 138, 58 Stat. 672 (1944). In doing so, the Congress stated:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States be and hereby is, given to said agreement, and to each and every part thereof; and the boundaries established by said agreement are hereby approved: Provided, however, That nothing herein contained shall be construed to impair or in any manner to affect any right of the United States or jurisdiction of its courts in and over the islands or waters which form the subject of said agreement.

Id. at 673.

According to Rhode Island and New York, the existence of the boundary agreement which divides Block Island Sound between them, and the fact that the agreement has been approved by Congress, should qualify Block Island Sound as historic internal waters.¹¹

¹¹ The States also place great emphasis upon a letter dated April 8, 1969, which was sent by the Legal Advisor of the United States Department of State to the Solicitor General of the United States. U.S. Ex. 13. See also Dolan, Nov. 9, 1981, at 59-60. According to the States, the letter concludes that because a New York-Connecticut boundary agreement was approved by Congress, Long Island Sound constitutes historic internal waters. The States assert that because Congress used identical language in approving the New York-Rhode Island boundary agreement, Block Island Sound should likewise constitute historic inland waters.

The Special Master does not agree with the States' interpretation of the letter. The letter does not state that the boundary agreement between New York and Connecticut alone was sufficient reason to consider Long Island Sound a historic bay. Rather the letter states that the "status of Long Island Sound as 'historic' has never been disputed," and goes on to cite authorities supporting this statement. The letter concludes further that "[s]ince Connecticut's water boundary, as defined in the compact approved by Congress, lies wholly in inland waters there is no territorial sea offshore from Connecticut. . . ." The letter does not conclude the issue in this proceeding, nor does it significantly support the claim that Block Island Sound is a historic bay.

The Special Master concludes that the boundary agreement does not support the States' historic claim. This conclusion is based on two factors. First, it is clear from the Congressional approval of the agreement that Congress did not accept Block Island Sound as constituting internal state waters. Rather, Congress only approved the agreement as an agreement solely between two states and stated that the agreement was not to be construed so as to impair or affect any rights of the United States.

Second, the enactment of the boundary agreement, in and of itself, is insufficient to establish a historic claim as to Block Island Sound.¹² The States presented no evidence of the exercise of any authority under this agreement. Additionally, the exercise of authority that was examined under the first two categories of evidence does not measure up to the exercise of authority that is needed to establish a historic claim.

The Special Master concludes that Rhode Island and New York have *not* established a historic claim to Block Island Sound. The States presented no evidence sufficient to show an exercise of the type of authority or dominion over Block Island Sound that is required to establish a historic claim. Even if the States' evidence is accepted as demonstrating a proper exercise of authority, the evidence is still far from establishing clearly beyond doubt that the States exercised sovereignty over the waters of Block Island Sound. Additionally, it cannot be inferred from any of the evidence that any foreign nation has ever had the opportunity to acquiesce to such an exercise of authority over Block Island Sound.¹³

¹² In *United States v. California*, the Supreme Court stated:

[A] legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish [a claim of historic inland waters].

381 U.S. at 174.

¹³ At oral argument, New York did argue, however, that there is no record of any foreign nation resisting having to take on a licensed pilot to pass through Block Island Sound. May 14, 1982 at 43-44.

V. JURIDICAL BAY DISCUSSION

A. ARTICLE 7

Since Block Island Sound is not entitled to historic bay status it is now necessary to determine whether Long Island Sound and Block Island Sound qualify as a juridical bay under Article 7 of the Convention. In regard to bays, Article 7 provides:¹⁴

Article 7

1. This article relates only to bays the coasts of which belong to a single state.
2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

¹⁴ A comparison of Article 7 of the Convention with the corresponding Article of the Final Draft of the Third United Nations Conference on the Law of the Sea of October 7, 1982 (U.N. Doc. A/CONF.62/122), reveals that the proposed Convention's language regarding bays is substantively identical to the language in Article 7 of the 1958 Convention.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

For the purpose of analyzing the juridical bay criteria it is helpful to separate the subsections of Article 7 according to the criteria they address. Generally, Articles 7(2) and 7(3) supply the criteria for determining whether a bay exists, and Articles 7(4) and 7(5) provide the criteria for closing a body of water that is found to be a bay. With respect to the question of whether a bay exists, Article 7(2) supplies three separate but related criteria. First, there must be a "well-marked indentation" into the coast which constitutes "more than a mere curvature of the coast." Second, the indentation must enclose an area which "is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation." (Article 7(3) provides further guidance on making this calculation.) Third, the indentation must "contain landlocked waters."

B. THEORIES OF THE PARTIES

With respect to the juridical bay approach, Rhode Island and New York set forth three different theories for applying the juridical bay formula to the geographic area in question. The first is to view Long Island as an extension of the mainland (like a peninsula) stretching out roughly parallel to the Connecticut shore. When viewed this way, Long Island serves to enclose the waters of Long Island Sound and Block Island

Sound, thereby forming a single overall juridical bay. Rhode Island and New York place the most emphasis on this theory and they argue quite extensively that, when the area is viewed in this manner, the Article 7 criteria for a juridical bay are satisfied.

The second way to apply the juridical bay test is to envision two bays as originating from the two sides of Long Island at its western end. Viewed in this manner, Long Island on its south side forms part of the bay constituting New York Harbor and on its north side forms a bay consisting of Long Island Sound and Block Island Sound.¹⁵

The third theory views Long Island and Block Island as screening islands across the entrance of a bay that stretches from Throgs Neck, New York to Point Judith, Rhode Island.¹⁶

¹⁵ This approach comes from P. Beazley, *Maritime Limits and Baselines: A Guide to their Delineation*, Special Publication No. 2, 20 (rev. 2d ed. 1978). Although a review of Beazley's analysis with respect to the two-headed bay theory leaves it unclear as to which provision of the Convention Beazley relies on, New York apparently argues that the analysis is based on Article 7. See also *infra*, note 34.

¹⁶ This theory appears to be the one adopted by the First Circuit in *Warner v. Dunlap*, when it concluded that Long Island Sound and Block Island Sound formed an Article 7 juridical bay. The First Circuit stated:

Plaintiffs contend and the defendants concede that under the semi-circle test Block Island Sound does not constitute a bay. The district court found, however, that the Convention's test ought more properly to be applied "to the entire geographical body of water enclosed within lines drawn at the East River in New York City on the west and between Point Judith, Block Island and Montauk on the east." Essentially the area enclosed would include Block Island Sound and Long Island Sound in combination; and this body of water, the court found, constitute [sic] a bay within the meaning of the Convention.

Plaintiffs contend that the district court erred in applying the semi-circle test to the combination of Long Island Sound and Block Island Sound. They claim that under the Convention a bay must be a "well-marked indentation" and "penetration." Plaintiffs assert that these criteria are not met because the Long Island Sound-Block Island Sound configuration is open at its western end where the East River separates Long Island from the "main land mass", and that when Long Island is removed from the picture there remains only "a mere curvature of the coastline" without the necessary "indentation."

(continued on next page)

Application of the juridical bay test of Article 7 under these theories would require, according to the States, that baselines be drawn across two mouths to the resulting bay; that is from Montauk Point on Long Island to a point near Southwest Point on Block Island and from Sandy Point on Block Island to Point Judith, Rhode Island. See Appendix C.

The United States asserts with regard to the application of the juridical bay test of Article 7 to Long Island Sound and Block Island Sound that when the coastline from New Jersey

tion" or "penetration". However, this claim must fail.

Under plaintiffs' analysis Long Island is to be considered "just another island off the coast" that cannot serve to define, as the district court found it did, the boundary edge of an inland bay. Yet, the Supreme Court has specifically noted that Long Island Sound "is considered inland water rather than open sea." *United States v. Maine*, 420 U.S. 515, 517 n.1, 95 S.Ct. 1155, 1156, 43 L.Ed.2d 363, 366 (1975). Further, as the district court noted, "plaintiffs' own expert could give no reason why" the semi-circle test should not be applied to the combination of Long Island Sound and Block Island Sound. The court found this to be the most "sensible" configuration upon which to apply the semi-circle test and we cannot say this judgment was improper, particularly since the Convention provides that "[w]here . . . an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." . . . Accordingly, as the district court properly found, Block Island Sound is contained within and is a "bay" within the meaning of 46 U.S.C. 211.

532 F.2d at 769-70.

Rhode Island offers one additional approach for finding Block Island Sound a juridical bay. Rhode Island argues that the criteria of Article 7 can be applied to Block Island Sound, standing by itself, to determine that Block Island Sound is a juridical bay. With respect to this approach Rhode Island states, without giving any further authority, that application of Article 7 in this manner is made possible by the fact that Long Island Sound has been accorded historic bay status. See R.I. Pre-Hearing Memorandum at 6 n.3, 9-10. Rhode Island points out that under this approach the issue of whether Long Island should be considered part of the mainland becomes irrelevant. *Id.*

The Special Master does not find this approach to be credible. Dr. Hodgson testified that such an approach is "totally foreign to the definition of a bay in the Convention." Hodgson, Dec. 19, 1978 at 86-87. Mr. Dolan testified that Block Island Sound would not satisfy the requirements for an Article 7 bay if Block Island Sound is examined separate from Long Island Sound. Dolan, Nov. 9, 1981, at 126.

through Rhode Island is viewed there are no indentations into the mainland that will satisfy Article 7(2).¹⁷ Only if Long Island were a part of the mainland would the geographic situation satisfy the indentation requirement. After arguing that Long Island should not be considered an extension of the mainland, the United States asserts that in the event the Special Master finds that Long Island is an extension of the mainland and concludes that Long Island Sound satisfies the other Article 7 criteria, the resulting juridical bay should be closed by a line running from Montauk Point on Long Island to Watch Hill Point, Rhode Island. The normal baseline rule of Article 3 and Article 10 would still apply to the rest of Block Island Sound.

C. INDENTATION

Since the success of each party's position with regard to whether there is a juridical bay depends upon the existence of an indentation, the indentation into the coast requirement of Article 7(2) will be explored first.

In *United States v. Louisiana*, the Supreme Court stated the following:

[T]he general understanding has been — and under the Convention certainly remains — that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay.

394 U.S. at 62 (Emphasis original). The Court went on to state:

We have concluded that Article 7 does not encom-

¹⁷ When considering whether an indentation into the mainland exists, the practice of the United States is to first visually eliminate any islands in an area and then ascertain whether there are any indentations into the coast of the mainland. See U.S. Post-Trial Opening Brief at 32-33; Smith, Nov. 10, 1981 at 34-35, 134-36, 2-65; Hodgson, Dec. 19, 1978 at 71-72 (U.S. Ex. 73).

pass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention.

Id. at 67.

It is clear from this Supreme Court language that an indentation must be into the mainland for purposes of Article 7(2). After reviewing the theories offered by the parties and viewing charts of the area in question, it is also clear that there are only two possibilities which can be explored with respect to whether an indentation into the mainland exists in the area of Long Island Sound and Block Island Sound. The first inquiry to make is, whether there is an indentation into the mainland that will qualify Long Island Sound and Block Island Sound as a bay when Long Island is viewed strictly as an island thereby requiring the island to be ignored when applying the indentation test. The second inquiry is, if Long Island can be considered an extension of the mainland for Article 7 purposes, will there then be an indentation into the mainland that qualifies Long Island Sound and Block Island Sound as a bay?

1. Long Island as an Island

With respect to the first possibility, a review of the testimony reveals that the witnesses for the United States were certain that if Long Island is viewed as an island, there is no indentation into the coast, while the witnesses for the States were equivocal on the issue and their testimony does not support a finding that there is indentation.

For the Government, Robert L. Smith, the geographer with the United States Department of State, was offered as an expert in political geography and particularly as it pertains to maritime limits. He stated, in effect, that in the absence of Long Island the only indentations in the coast from New Jersey to Massachusetts are at New York Harbor and at Nar-

ragansett Bay. See Smith, Nov. 10, 1981, at 32-43. Derek W. Bowett, a professor of international law at the University of Cambridge in England, and offered as an expert in "international law and practice in matters of maritime delimitation," agreed that although the question of whether there is an indentation "is a matter of judgment," the coast to the north of Long Island Sound is a "typical curvature . . . and not a well marked indentation." Bowett, Nov. 12, 1981, at 23, 26-27. Robert D. Hodgson, the former Geographer with the United States Department of State and a former member of the Interagency Baseline Committee, the group responsible for delimiting the baseline of the United States, concluded that, without Long Island being considered an extension of the mainland, no indentation exists that will qualify Long Island Sound as part of a bay. Hodgson, Dec. 19, 1978, at 77-79 (U.S. Ex. 73). Finally, Hugh J. Dolan, an Administrative Law Judge assigned to the United States Department of Commerce and also a former member of the Interagency Baseline Committee, testified that in the absence of Long Island, there is "no more than a curvature of the . . . coast, no true indentation," nothing that meets the requirements of a bay. Dolan, Nov. 9, 1981, at 55-56.

For the States, Jeremy C. E. White, the hydrographic officer with the Port of London Authority, was offered by Rhode Island as an expert in hydrography and application of the Convention to geographic features. When asked by the Special Master what the situation would be if Long Island is not an extension of the mainland, White responded:

I'm not entirely sure that one could not consider this area as an indentation with an island in its mouth, in much the same way as in Hodgson and Alexander, they take a rather shallow indentation in the coast and say that without islands across its mouth it's not really a juridical bay; but if you put screening islands in its mouth, it really is a juridical bay; but I haven't pursued that in any great detail.

White, Nov. 12, 1981, at B-69 to B-70. Myers S. McDougal, a professor at Yale Law School and offered as an expert on

"international law and the law of the sea," stated the following when asked to assume that Long Island was "open sea."

What is the curvature is a function, again, of all the circumstances, but if the circumstances were simply open sea and a coast like that, I don't have any great difficulty with it.

. . . [I]f it was open sea or coast like that, I don't think you could satisfy Article 7.

McDougal, Jan. 12, 1982, at 86. McDougal, however, went on to state that whether Long Island is found to be an island or part of the mainland, it should still make up one side of a juridical bay for purposes of the Convention. *Id.* at 86-91. Finally, Jean Gottman, a professor of geography at the University of Oxford In England and offered as an expert on geography and particularly political and economic geography, stated the following with respect to whether an indentation in the coast exists in the absence of Long Island:

No, no, it's not an indentation that could be considered a bay under Article 7, no, but the point is that you have removed reality from here.

Gottman, Jan. 12, 1982, at 102. After further questioning, Gottman stated:

Whether indentation or curvature, it would be a matter of semantic definition. I think one could make some case for an indentation still, because the curvature northwards is very clearly noticeable.

I do not know how one can draw a line between indentation and curvature. Every indentation supposedly is a curvature. Where the curvature stops

being only a curvature and becomes an indentation,
I frankly do not know.

Id. at 103.

The Special Master concludes, based on the evidence summarized above and on the geographic configuration of the Long Island Sound and Block Island Sound area, (See Appendix B.) that when Long Island is viewed strictly as an island there is no indentation into the coast that will satisfy the requirement of Article 7(2). The coast in this area is only a mere curvature. This conclusion eliminates two of the juridical bay theories offered by the States: the approach where Long Island is envisioned as forming two bays at its western end, and the approach where Long Island and Block Island are viewed as screening islands. Without an indentation into the coast, neither theory will satisfy the requirements of Article 7.

2. Long Island as an Extension of the Mainland

With respect to the second possibility, that is, assuming Long Island is an extension of the mainland, is there an indentation which will qualify the Long Island Sound and Block Island Sound area as a bay, a review of the testimony reveals that all of the witnesses who testified on this question were generally in agreement that an indentation would exist.

On behalf of the States, Jeremy White testified:

[T]he article 7 requirements are that there shall be a deep indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and again on the premise that Long Island is part of the mainland then that is undoubtedly met.

White, Nov. 12, 1981, at 147. Myers McDougal testified with reference to Long Island making up one side of the bay that "the indentation is six times as long as the width there. . .

[so] the literal language of Article 7 seems to fit this appropriately." McDougal, Jan. 12, at 101. Last, Jean Gottman testifying for the States, stated that he considered Long Island Sound and Block Island Sound as "definitely an indentation" and "a long indentation with a rather irregular shape." Gottman, Jan. 12, 1982, at 52.

For the Government, Robert Smith testified, in effect, that based on the assumption that Long Island is a peninsula, an indentation exists which encloses Long Island Sound and part of Block Island Sound. Smith, Nov. 10, 1981, at 2-30 to 2-31. Derek Bowett testified that, assuming Long Island is a peninsula rather than an island, "you would have . . . a very well marked indentation." Bowett, Nov. 11, 1981, at 41-42. See also *id.* at 83, 99-100. Finally, Robert Hodgson apparently agreed that an indentation exists which satisfies Article 7(2) if Long Island is found to be an extension of the mainland. He stated:

There was no deep indentation of the coast in this particular area that would comprise a second bay . . . unless in going back you concede that Long Island is a part of the mainland. . . .

Hodgson, Dec. 19, 1978, at 77-78 (U.S. Ex. 73).

Based on the overwhelming evidence and the geographic configuration of the Long Island Sound and Block Island Sound area (See Appendix B), the Special Master concludes that if Long Island is an extension of the mainland for Article 7 purposes, an indentation into the mainland exists that satisfies the indentation requirement of Article 7(2).

In view of this determination three questions remain to be answered in this proceeding. First, under Article 7 of the Convention can a single large island be treated as an extension of the mainland thereby forming an indentation, and if so, can Long Island be considered an extension of the mainland? Second, if Long Island is treated as part of the mainland, does the resulting indentation satisfy the semi-circle test of Articles 7(2) and 7(3)? Last, if Long Island is treated

part of the mainland and the resulting indentation satisfies the semi-circle test where are the closing lines of the indentation to be located so as to enclose landlocked waters and form a juridical bay?

D. WHETHER LONG ISLAND IS AN EXTENSION OF THE MAINLAND

The initial question to be resolved is whether Long Island can be treated as part of the mainland for the purpose of creating an indentation. The analysis must be broken down into two steps: (1) whether under the terms of the Convention, islands can be treated as mainland to form an indentation; and (2) if islands can be used, whether Long Island is such an island.

1. Whether Islands Can be Treated as Part of the Mainland

The United States argues that under Article 7 islands cannot be used to form a bay and to treat an island, such as Long Island, as part of the mainland for the purpose of forming an indentation and ultimately a bay would be contrary to "proper application of the Convention."¹⁸ The Government argues that the Supreme Court in *United States v. California*, 381 U.S. 139 (1965), addressed whether coastal islands can form juridical bays and rejected the concept.¹⁹ Thus, accord-

¹⁸ The Government clarified its position with regard to whether islands can be treated as part of the mainland in its Post-Hearing Memorandum where it stated:

Our position here is not that no island can be treated as part of the mainland, but rather that, under the applicable precedents, Long Island (and Block Island) are too large and too far seaward of land to be considered as part of the mainland or the headland of any bay.

U.S. Post-Hearing Memorandum at 3.

¹⁹ In *United States v. California*, the Supreme Court rejected the argument that the Santa Barbara Channel could be considered a "fictitious bay". 381 U.S. at 170-73. The channel could not be a true Article 7 bay because the distance across the mouths of the bay (the distance between the islands and the California coast) exceeded 24 miles. *Id.* at 170. In *United States v. California*, no argument was made that the islands laying off the California coast should be considered a part of the mainland. In the present case, the parties have not argued that Long Island Sound and Block Island Sound form a "fictitious bay".

ing to the government, the "normal rule" is that juridical bays are not formed by coastal islands. Further, the Government argues that in *United States v. Louisiana*, 394 U.S. 11 (1969), the Supreme Court reaffirmed the normal rule that islands cannot be used to form juridical bays. The Government recognizes that, in *United States v. Louisiana*, the Supreme Court created an exception to the normal rule by allowing islands to be used as the headlands of a bay, but argues that the opinion does not suggest bays can be created behind coastal islands. The United States asserts that the *Louisiana* exception is limited to "the particular deltaic formation there at issue" such that small islands can be used as the headlands of a bay only where the shoreline is deltaic in nature, actually consisting of innumerable small islands.²⁰ The *Louisiana* criteria cannot, the Government contends under this rationale, be used to treat a large island, like Long Island, as part of the mainland.

The United States presented evidence of how coastal islands in other areas have been treated for baseline purposes to support its position that islands cannot generally be used to form bays and that the *Louisiana* exception is limited to its specific situation. One area cited by the Government is the southern coast of Alaska. U.S. Ex.M-20 through M-28. The southern coast of Alaska is made up of numerous coastal islands which the United States has not utilized to form juridical bays.²¹ The Government also cites Caillou Bay in Louisiana as another situation where islands have not been used to form a juridical bay. U.S. Ex. M-29, M-31. See Appendix

²⁰ The United States recognizes four limited situations where islands can be considered as part of the mainland to form a bay. First, where an island is separated from the mainland by a "river" such that the island is a bank of the river, it can be treated as mainland. Second, where an island is connected to the mainland by a causeway, and third, where an island is connected to the mainland by a low tide elevation, the island can be treated as part of the mainland. Last, where a shoreline is deltaic in nature, actually consisting of innumerable small islands, the small islands can be treated as part of the mainland. See Hodgson, Dec. 19, 1978 at 10-11; Smith, Nov. 10, 1981 at 2-8.

²¹ This portion of the Alaskan coastline has not been the subject of any litigation.

E. Caillou Bay is formed on one side by the Louisiana coast and on the other side by a group of two islands of the Isles Dernieres. These islands were not used to form an indentation. In the *Louisiana* case the Supreme Court considered Caillou Bay and stated:

Louisiana does not contend that any of the islands in question [including the Isles Dernieres of Caillou Bay] is so closely aligned with the mainland to be deemed a part of it, and we agree that none of the islands would fit that description.

394 U.S. at 67 n.88. The United States argues that the two Isles Dernieres islands are distinct coastal islands and different from the marshy deltaic islands that the Court allowed to be considered part of the mainland. Thus, according to the Government, only small marshy deltaic islands can be considered part of the mainland and coastal islands cannot be assimilated as part of the mainland and cannot be used to form juridical bays.²²

²² This Government argument is undermined by the *United States v. Louisiana* opinion it relies upon. It is significant that, in the *Louisiana* case, the Supreme Court obviously considered whether the two Isles Dernieres islands should be treated as part of the mainland for the purpose of forming an indentation. See 394 U.S. at 66-67. The Court made a factual determination that these islands could not be considered part of the mainland to form a bay. *Id.* at 67 n.88. The Government's legal conclusion that larger coastal islands cannot be used to form a bay does not follow from the Court's factual finding. The Court did *not* conclude that coastal islands may never be treated as part of the mainland.

It is also clear from the Special Master's report of July 31, 1974, in *United States v. Louisiana*, No. 9 Original, that Special Master Armstrong was definitely inclined to treat the Isles Dernieres islands as part of the mainland but felt the issue was foreclosed by the Supreme Court's prior finding in the *Louisiana* case. He stated:

One of the most difficult areas involved in this litigation is that known as Caillou Bay. It is obvious that were it not for the existence of the Isles Dernieres, there would be no question of the existence of a bay at this location, for without them there is no indentation in the coastline enclosing landlocked waters between clearly defined natural entrance points. . . . The only theory on which a bay can be said to exist at all is if the Isles Dernieres are considered as extensions of the mainland so as to form one of its shores.

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Rhode Island and New York argue that Article 7 does allow islands to be treated as part of the mainland for the purpose of forming an indentation and a bay. The States argue that the language of Article 7 "clearly indicates" that a bay can be formed in part by an island. The States rely on the history of the Convention²³ and international law to support their position. According to the States, the Supreme Court, in *United States v. Louisiana*, recognized that islands can be treated as part of the mainland for the purpose of forming a juridical bay and listed some of the factors that should be considered when deciding whether a particular island should be con-

This argument appears to have been foreclosed by the holding of the Court in the second *Louisiana* opinion. . . .

[T]he Court independently reached the conclusion that none of the islands in the Caillou Bay area does fit the description of islands which could realistically be considered part of the mainland. In the absence of such a holding the Special Master would upon the evidence presented before him be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland and would therefore hold the Caillou Bay is a juridical bay. . . .

But the language of the Court quoted above appears to require a holding that there is no configuration in the area which meets the requirements of a bay, and therefore nothing for which a closing line could be determined.

Id. at 49-51. From the above language, it is apparent that Special Master Armstrong did not believe that the *Louisiana* exception is limited to small deltaic islands, but is equally applicable to larger coastal islands.

²³ New York's *Commentary of the International Law Commission (ILC) from its discussions on the text of the Convention as supporting the States' position that under Article 7 islands can be used to form bays*. For example, the 1955 report of the ILC to the United Nations General Assembly states:

If, as a result of the presence of islands, an indentation which has to be established as a "bay" has more than one entrance, the sum total of the length of the different entrances will be regarded as the length of the bay. Here, the Commission's intention was to indicate that the presence of islands at the entrance to the indentation links it more closely with the territory, which may justify some alteration of the proportion between the length and the depth of the indentation. In such a case an indentation which without islands at its entrance would not fulfil the necessary conditions is to be recognized as a bay.

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sidered part of the mainland. The States argue that the *Louisiana* criteria can be applied to Long Island to treat it as part of the mainland, and that the principle recognized by the Supreme Court is *not* limited to the geography of the Mississippi River delta.

The Special Master concludes that Article 7 of the Convention allows islands to be treated as part of the mainland, and in the proper circumstances an island can be used to form an indentation and consequently a juridical bay. This conclusion is supported by the Supreme Court's interpretation and application of Article 7 in *United States v. Louisiana*.²⁴

In *United States v. Louisiana*, the Supreme Court considered in two different contexts whether under the Convention islands can be used to form bays. The Court considered first, whether islands can be used as headlands of bays. 394 U.S. at 60-66. The Court stated:

No language in Article 7 or elsewhere positively excludes all islands from the meaning of the "natural entrance points" to a bay. Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on

Report of the International Law Commission to the General Assembly, U.N.Doc.A/2934 (1955), reprinted in, [1955] 2 Y.B. Int'l Law Comm'n 37, U.N. Doc.A/CN.4/SER.A/1955/Add.1 (N.Y. Ex. 9).

New York argues that the clear indication of such language is that islands may be used to form part of a bay. A review of the Summary Records of the ILC for 1955 and 1956 indicates that this language addresses the problem created by the presence of islands in the mouth of a bay (Article 7(3)). Except for the indication that the drafters of the Convention took islands into account in the one situation, the language is inapposite to the question of whether islands can be treated as part of the mainland to form an indentation.

²⁴ The above conclusion is also supported by the testimony of two United States witnesses. Robert W. Smith testified, "[K]eeping in mind the geographical circumstance which the Court was looking at [in the *Louisiana* case], . . . I tend to think that the Court was trying to develop language that could be applicable elsewhere." Smith, Nov. 10, 1981, at 2-10. Derek W. Bowett testified that under the Supreme Court decision in *United States v. Louisiana*, a fringe of islands can make up the side of a bay. Bowett, Nov. 11, 1981, at 88.

account of an additional narrow opening to the sea. That the area of a bay is delimited by the "low-water mark around the shore" does not necessarily mean that the low-water mark must be continuous.

Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been — and under the Convention certainly remains — that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. . . .

. . . While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, and the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance — in the light of these and any other relevant criteria and any evidence he finds it helpful to consider — whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

Id. (Emphasis original). Second, the Court considered whether fringes of islands along the coast can form the perimeter of a bay such that the water between the islands and the main-

land will be inland waters. *Id.* at 66-73. With respect to this issue the Court stated:

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland.

Id. at 67.²⁵

Additionally, the fact that the Supreme Court considered whether the Isles Dernieres of Caillou Bay should be considered part of the mainland indicates that the rationale of the *Louisiana* case is *not* a narrow exception limited to deltaic formations. If the Court had intended to limit its holding, the Court would have said that such islands could not be considered.

²⁵ The Court also recognized that other authorities hold the view that islands can be treated as part of the mainland, by saying:

"Obviously, some islands must be treated as if they were part of the mainland. The size of the island, however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 Am. J. Int'l. L. 240, 258 (1951).

"Islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Pearcey, Geographical Aspects of the Law of the Sea, 49 Annals of Assn. of American Geographers No. 1, p. 1, at 9 (1959).

The Director of the Coast and Geodetic Survey Department of Commerce, has stated the following rule for the assimilation of islands to the mainland:

"The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of a land form." Memorandum of April 18, 1961, excerpted in 1 Shalowitz, [Shore and Sea Boundaries] 161, n.125 [(1962)].

Shalowitz has recognized that "[w]ith regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." *Id.*, at 162. And see Strohl, [The International Law of Bays] 76, fig. 18 [(1963)].

394 U.S. at 65-66 n.85.

Aside from the general guidelines established by the Court in *United States v. Louisiana*, three related aspects of the decision support the conclusion above. First, the decision indicates that Article 7 of the Convention is not to be read narrowly and applied strictly, but there are exceptions to the normal rules. Second, it indicates that Article 7 does not cover all the situations under which a body of water can be a jurisdictional bay.²⁶ Last, the decision demonstrates that when dealing with different situations, a realistic and common-sense approach must be taken in interpreting the Convention. See 394 U.S. at 63-64. The law established by the Court in *United States v. Louisiana* was not drawn so narrowly as to be limited to the specific facts of the case. Rather, in the *Louisiana* case, the Court set out more general guidelines, that can be applied to other fact situations.

2. Whether Long Island Can Be Considered a Part of the Mainland.

It is now necessary to determine whether Long Island should be treated as a part of the mainland to form an indentation.

In *United States v. Louisiana*, the Supreme Court listed several factors to consider when determining whether an island

²⁶ The testimony of several witnesses address this point. See Dolan, Nov. 9, 1981, at 84; Smith, Nov. 10, 1981, at 19-20, 121-22; Gottman, Jan. 12, 1982, at 71; White, Nov. 13, 1981, at C-74. See generally, *United States v. Louisiana*, 394 U.S. at 42, 61.

The practice of the United States with regard to baselines and Article 7 indicates that the Convention does not provide for all possible situations, and arguably militates against strict application of the Convention. Several witnesses testified that the United States uses objective tests in its application of Article 7, none of which find support in the strict language of the Convention. For example, the United States developed and uses the forty-five degree test, the bisector of the two tangents test, and the shortest distance test to identify the natural headlands of a bay. See Hodgson, Dec. 19, 1978, at 6-7 (U.S. Ex. 73); Dolan, Nov. 9, 1981, at 52; Smith, Nov. 10, 1981, at 75-77, 138-40; Bowett, Nov. 11, 1981, at 45. See also Smith, Nov. 10, 1981 at 142-43, 2-1 to 2-5. The United States also follows the screening islands rule to allow islands to make up the closing line of a bay. See U.S. Post Trial Reply Brief at 11-12. See also Smith, Nov. 10, 1981 at 40-41, 142, 2-40; Bowett, Nov. 11, 1981 at 96.

should be treated as a part of the mainland. As set forth above, the Court stated:

[T]he question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

394 U.S. at 66.²⁷ In another part of the opinion, the Court indicated that an island's "origin . . . and resultant connection with the shore" is another factor to consider. *Id.* at 65 n.84.

The Court pointed out that its enumeration of factors to consider is illustratively only, and was not intended to be an exhaustive list. *Id.* 66 at n.86. The United States maintains, however, that under Article 7 only geographic factors can be considered when determining whether an island should be

²⁷ In two notes to the opinion the Court spoke of an island's *alignment* with the mainland. In the first note the Court stated:

The United States argues that since the Convention in Article 7(3) specifically recognizes that islands may create multiple mouths to bays, it cannot be construed to permit islands to create the bays themselves. Alternatively, the Government argues that if a closing line can be drawn from one side of a bay to an island as the headland on the other side, then it must be continued from the island to the nearest point on the mainland; and the distance to the mainland must be added to that across the bay in determining whether the 24-mile test is satisfied. These arguments, however, misconstrue the theory by which the headland is permitted to be located on the island — that the island is so closely aligned with the mainland as realistically to be considered an integral part of it.

394 U.S. at 62 n.83 (emphasis added). In the second note the Court stated:

Louisiana does not contend that any of the islands in question is so closely *aligned* with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description.

Id. at 67 n.88 (emphasis added). It is possible that by speaking of an island being "closely aligned with the mainland," the Court was suggesting another factor that can be considered. The Special Master believes, however, that the court was using "aligned" as a word of art to refer to at least all the physical geographic factors it enumerated.

treated as part of the mainland. The Government does not read the Supreme Court's language as allowing consideration of other factors.²⁸ The United States maintains that consideration of factors other than geographic factors is allowed only with regard to straight baselines under Article 4 and historic bays. The States argue, however, that the above language allows factors other than pure geographic considerations to be taken into account when determining whether an island can be treated as part of the mainland. They also argue that when the Convention is read as a whole, it suggests that factors other than geographic factors can be considered.²⁹

The United States maintains that even if an island can be used to form a bay, there is no basis for concluding that Long Island constitutes a part of the mainland, because Long Island is in fact an island that is separated from the mainland

²⁸ This position is supported by Special Master Armstrong's report on July 31, 1974 in *United States v. Louisiana*, No. 9 Original. Special Master Armstrong states:

Turning now to the easternmost area in controversy. . . , it becomes necessary to establish the closing line for Bucket Bend Bay. . . [I]t is necessary to determine whether there exist in the area islands or low-tide elevations . . . which should be considered part of the mainland. . . .

. . . Applying the test outlined by the Court. . . , neither the size, distance from the mainland, depth and utility of the intervening waters, shape of the low-water elevations, or their relationship to the configuration or curvature of the coast indicate [sic] that they should be assimilated to and treated as a part of the mainland. While it is true that the Court leaves open the possibility of considering other relevant criteria and states that the list given is intended to be illustrative rather than exhaustive, this appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless be so assimilated. In any event, there appear to be no other criteria in the case of the low-water elevations under consideration which would lead to a contrary conclusion.

Id. at 35-37.

²⁹ The States point out that in the *Louisiana* case it was the United States that postulated that the permanent highway connecting the Florida Keys was a basis for considering them part of the mainland. See 394 U.S. 72 n.95.

by a narrow but significantly deep and utilized channel of water — the East River. The Government focuses on one of the factors enumerated by the Supreme Court — "the depth and utility of the intervening waters" — to argue that if an island is separated from the mainland by a commercially navigable waterway, the island *cannot* be considered a part of the mainland. In support of its argument the Government presented evidence on the utilization and nature of the East River. According to the Government evidence, the East River is commercially navigable and although it has been deepened to aid navigation, the East River has been considered commercially navigable since the early 1600's. While the East River cannot be navigated by the largest of commercial vessels in use today, in 1972 there were in excess of 77,000 commercial movements on the East River and 52 million short tons of cargo were moved on the river. Additionally, according to the Government evidence, the East River is in fact not a river but a tidal strait which is fed by the tidal flow between Long Island and lower New York harbor.³⁰ Thus, Long Island is a distinct coastal island, completely surrounded by sea water. The United States argues essentially that because of the definite geographic separation between Long Island and the mainland, Long Island cannot be considered a part of the mainland.³¹

³⁰ A "river" is a natural stream of greater volume than a creek having a fresh water source flowing generally in one direction towards a sea, lake, or other river in a more or less permanent bed or channel with defined banks or walks, with a current which may be either continuous in one direction or affected by the ebb and flow of the tidal current. The fresh water flow is controlled by the topographic difference between the source and receiving body of water. See Swanson, Nov. 11, 1981, at 3-55 to 3-56. See also Black's Law Dictionary 1193 (5th ed. 1979).

A "strait" is a relatively narrow waterway that connects two larger bodies of water, the water movement of which is determined by the interconnected bodies. See Swanson, Nov. 11, 1981, at 3-56.

The United States argues also that because the East River is not a river, Long Island does not form the bank of a river and consequently cannot be treated as part of the mainland. See *supra* note 20.

³¹ The Government also argues that the Supreme Court decided this very issue in a note to *United States v. Louisiana*. The note reads in part:

Strohl posits that "a fringe of islands can make up one side of a bay." Strohl, *supra*, n.23, at 72, but recognizes that the only pro-

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The Government relies heavily on the findings of the Law of the Sea Task Force Committee on the Delineation of the Coastline of the United States, which is also referred to as the Baseline Committee. The Baseline Committee was an interagency committee, comprised of representatives of the Departments of State, Commerce, Interior, Transportation and Justice, that was established to determine the baseline around the United States and draw closing lines where needed. In late 1970 and early 1971 the Committee considered whether Long Island Sound and Block Island Sound could be closed as a juridical bay under Article 7. The Committee considered several alternatives and ultimately concluded that the two bodies of water could not be closed as a juridical bay. The Committee concluded that Long Island was an island that could not be considered a part of the mainland and thus the area could not qualify as an Article 7 bay. The January 4, 1971, Committee minutes state:

The Committee gave consideration to the possibility

vision of the Convention which would authorize such a baseline is Article 4. *Id.*, at 60. The conclusion is not undermined by occasional references to an insular formation as creating a "bay". See, e.g. [1955] 1 Y.B. Int. L. Comm'n 211, Bouchez, *supra* n.23, at 233 (both referring to Long Island Sound); *Manchester v. Massachusetts*, 130 U.S. 240 (referring to Buzzard's Bay). Only one authority appears to assume, without discussion that a bay formed by islands would be governed by the provisions of Article 7, *Pearcy, supra* n.78, at 965. (The area in question was that between the coast of Florida and the chain of Keys curving to the south and east. The United States points out that they are linked by a permanent highway and therefore may be considered as part of the mainland.)

394 U.S. at 71-72 n.95.

The Government concludes from this footnote that the Supreme Court found that Long Island Sound was a body of water formed by an island. Therefore, the Government maintains, that since Long Island is an island, it *cannot* be considered as an extension of the mainland so as to qualify the Long Island Sound and Block Island Sound area as an indentation and a juridical bay.

After reviewing the Supreme Court's opinion in *United States v. Louisiana*, the note quoted above, and the authorities cited therein, the Special Master concludes that the Supreme Court's reference to Long Island and Long Island Sound in the fashion above does not support the proposition for which the Government offers it, and does not decide the issue presented in this proceeding.

of closing off [Long Island Sound and Block Island Sound] under the theory that it is a legal bay, in accordance with the rules contained in Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone. However, in order for this area to qualify as a legal bay, a prior determination must be made that Long Island constitutes a part of the mainland of the United States. If Long Island is an island, then the area in question does not qualify as a bay.

In order to determine whether or not Long Island could be considered essentially mainland, detailed consideration was given to the geography of the area. Not only was the distance separating Long Island from the mainland discussed, but also the depth of the channels separating it from the mainland and the use that is made of those channels by vessels. It was concluded that Long Island could not be considered part of the mainland based on any of these factors. The Committee then discussed whether or not Long Island could be considered part of the mainland based on the theory that it forms the bank of the East River. The geographer made a detailed study of this question and consulted other experts in the field. It was his conclusion that he could not consider the East River to be an actual river because of its physical characteristics, including the presence of a unique tidal regime. Consequently, the Committee could not conclude that Long Island should be considered as part of the mainland and drew the closing lines indicated on Chart 1211.

U.S. Ex. 19. Hugh Dolan, a member of the Baseline Committee, testified that Long Island was not considered a part of the mainland by the Committee, because Long Island is separated from the mainland by the East River which is a navigable waterway and is not a true river but a tidal strait. Dolan, Nov. 9, 1981, at 55-58. Robert Hodgson, also a member of the Baseline Committee, testified that the opinion of

the Committee was that the presence of a commercially navigable channel between an island and the mainland was sufficient to keep the island from being considered a part of the mainland. Hodgson, Dec. 19, 1978, at 36-37 (U.S. Ex. 73). Hodgson continued that the presence of a commercially navigable waterway was probably only "highly indicative" that an island should not be assimilated as part of the mainland and was not an exclusive test. *Id.* at 37-38.

The States argue that whether the East River is navigable is not a consideration relevant to the present issue and they contradict the Government's evidence on the navigability of the East River. The States' evidence demonstrates that although the East River is commercially navigable today, it is not the same body of water it was 150 years ago. The ships that navigate the East River today could not have done so in the early 1800's. Prior to improvements to the East River which were begun in the mid-1800's, the controlling depth of the river was between fifteen and eighteen feet and the current was ten knots. Prior to 1845, navigation in the Hell Gate section of the East River was considered to be "extremely dangerous." Today, the controlling depth of the East River is thirty-four feet and the current has been reduced to five knots.

New York argues that the relevant consideration is whether the East River and Long Island Sound are used as a route of international navigation, or are they "used as a route of passage between two areas of open sea," and not just whether the East River is navigable. New York derives this argument from *United States v. California*, where the Supreme Court stated:

[U]nder international law as expressed in the *Corfu Channel Case*, [1949] I.C.J. Rep. 4, the International Court of Justice held that a country could not claim a strait as inland water if, in its natural state, it served as a useful route for international passage.

381 U.S. at 172. In *United States v. California*, the Supreme Court did not consider this point to be of controlling impor-

tance, but New York argues, nevertheless, that it was considered and for the present case is a valid consideration. New York then asserts that the East River and Long Island Sound do not connect two areas of open seas, and thus, are not used as a route of international passage.³²

Rhode Island and New York also argue that whether the East River is a river or tidal in nature is unimportant to the present issue. The States presented evidence in contrast to the Government's conclusion that the East River is a tidal strait. According to the States, the East River, although it may be tidal, is not an ordinary tidal strait, but is part of a very complex estuarine system — the Hudson River estuary.³³ The East River and Long Island Sound have sources of fresh water. There was also testimony that the flow of the Hudson River, which is tidal far beyond Manhattan Island, is present in the East River.

Rhode Island and New York presented evidence of geographic, geological, social, economic, political and historic connections between Long Island and the continental land mass, and they rely on this myriad of connections to argue that Long Island and the continental land mass should be considered a part of the mainland. The bulk of the testimony the States rely on can be grouped into two major categories: geological and socio-economic. The geological evidence dealt with the formation of Long Island and Long Island Sound. Long Island, Block Island, and portions of the coast in this

³² Myers McDougal testified that Long Island Sound does not serve as a route of international passage. McDougal, Jan. 12, 1982, at 46-47. Additionally, the Baseline Committee concluded that although the East River and Long Island Sound receive heavy coastal traffic, they do not carry international traffic. See 8.

³³ Robert L. Swanson, the Director of the Office of Marine Pollution Assessment of the National Oceanic and Atmospheric Administration, testified that the prerequisites for an estuary are (1) a fresh water source, (2) a tidal body of water that is semi-enclosed, and (3) a tidal elevation and tidal range in that body of water. Swanson, Nov. 11, 1981, at 3-106 to 3-109. Black's Law Dictionary defines "estuary" as the mouth or lower course of a river that flows into the sea which is subject to the tide. Black's Law Dictionary 496 (5th ed. 1979).

area were formed by deposits of sediment and rocks brought from the mainland by ice sheets of the glaciers. The glaciers retreated approximately 25,000 years ago and ultimately the sea encroached on the newly formed land mass forming Long Island Sound and the other bays in the area. The socio-economic evidence dealt primarily with how the western end of Long Island is closely linked or tied to the mainland and how the two are interdependent. The western end of Long Island is part of New York City and the majority of New York City residents live on Long Island. On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels.³⁴ Long

³⁴ Rhode Island presented the testimony of Jeremy White, the hydrographic officer with the Port of London, in support of the position that Long Island should be treated as an extension of the mainland. White applied the analysis Peter Beazley presented in *Maritime Limits and Baselines: A Guide to Their Delineation*, Special Publication No. 2 (rev. 2d ed. 1978), to conclude that Long Island should be treated as part of the mainland. Beazley proposed objective criteria for determining when a single relatively large island lying close to the coast is situated such that two bays are formed between the island and the coast. White concluded from Beazley's criteria that Long Island is situated such that it is part of the mainland and forms two bays: New York Harbor Bay, and Long Island Sound and Block Island Sound Bay. White, Nov. 12, 1981, at 150-58, B-73.

Beazley's objective criteria require: (1) that the water area, bounded by the island, the mainland, and perpendiculars dropped from the extremities of the island to the mainland, be less than the area of the island; and (2) that the ratio of the length of the channel to its breadth (the average length of the two perpendiculars) should be greater than three to one. Beazley, *supra* at 20 (R.I. Ex. 16). White testified that he applied Beazley's tests to Long Island and Long Island Sound and found that the area of the enclosed water is 1,168 square sea miles, the area of the land is 1,213 square sea miles, and the length to breadth ratio is approximately ten to one. White, Nov. 12, 1981, at 150-158. According to White's figures Long Island and Long Island Sound satisfy Beazley's criteria. *Id.* See also U.S. Ex. 82.

Through White, Rhode Island offered the Isle of Wight, off the south coast of England, as an example of the application of Beazley's analysis. See R. I. Ex. 1A. White testified that the British government had treated the Isle of Wight as a situation where a relatively large island lying off the coast creates two bays. White, Nov. 12, 1981, at B-18 to B-24. Rhode

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Island is a large island situated along the coast and at its western end is separated from the mainland by only a narrow stretch of water. The island is closely related to the mainland geographically and physically, as well as socially and economically. After taking all the factors into consideration, the Special Master concludes that Long Island can be treated as part of the mainland.³⁵ Two factors are of utmost importance to this conclusion. Long Island's geographic alignment with the coast is the first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay. Second, the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound. Ships bound for ports not in the enclosed area navigate outside of Long Island and Block Island as they pass up and down the United States coast.³⁶ Long Island Sound

Island argues that the Isle of Wight must have been considered an extension of the mainland for the purpose of applying the Convention. From the evidence, it is impossible to determine whether Beazley's criteria were applied to the Isle of Wight in an Article 7 context.

White also testified that independent of Beazley's analysis, he would consider Long Island to be an extension of the mainland for the purpose of finding an Article 7 bay, because of the close relationship between Long Island and the mainland. White, Nov. 12, 1981, at 158.

The United States argues that Beazley's theory has no standing in international law and is too "unsound" to be followed; and thus, White's testimony must be rejected.

³⁵ This conclusion is reached without considering Beazley's analysis or the testimony of White. *See supra*, note 34. The Special Master makes no ruling on the merits of Beazley's theory.

³⁶ Captain John Neary, a professional pilot with twenty-five years of ship piloting experience, testified that ships traveling along the United States coast and not bound for New York Harbor or some port on Long Island Sound, pass to the east of Block Island and do not enter Block Island Sound, Long Island Sound, or the East River. Neary, Nov. 13, 1981, at C-88 to C-91.

is not a route of international passage; ships merely pass into and out of it as one would expect ships to pass into and out of a bay.

Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland. The fact that the East River is navigable and is a tidal strait, however, does not destroy the otherwise close relationship between Long Island and the mainland when all the factors are considered.³⁷ Long Island is so integrally related to the mainland that it should be considered an extension of the mainland. If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it. Long Island is closely linked with the mainland; it is situated such that a body of water that resembles a bay is enclosed, and the enclosed body of water is used like a bay. Thus, the Special Master concludes that Long Island can be treated as part of the mainland to form an indentation.

E. SEMI-CIRCLE TEST

Having concluded that Long Island is to be treated as part of the mainland and as such Long Island Sound is a well-marked indentation, it is now necessary to decide whether this indentation satisfies the semi-circle test of Articles 7(2) and 7(3). The evidence on this point is uncontradicted. All witnesses who testified with respect to the semi-circle test concluded that, assuming Long Island is an extension of the

³⁷ As stated above, the decision of the Baseline Committee that Long Island Sound was not a juridical bay because Long Island could not be treated as part of the mainland was based on two factors: (1) the East River is commercially navigable, and (2) the East River is not a river but a tidal strait. The September 7, 1971, minutes of the Baseline Committee (U.S. Ex. 16) reflect that at least some of the members of the Committee felt that Long Island Sound would definitely qualify as a juridical bay except for the East River. The Special Master concludes that the Committee's conclusion based on these two factors is erroneous because it ignores the close geographic alignment between Long Island and the mainland and the obvious bay like character of Long Island Sound.

mainland, the resulting indentation satisfies the semi-circle test. Jean Gottman testified:

The semicircle test is quite easy to do. If we close by lines going from Montauk Point to Block Island and from Block Island to the continent, to Point Judith, we have a length of approximately, I believe, 23 nautical miles, or very close to that, 22 and something, I believe.

.....

The semicircle test very obviously applies — this is a very vast area of water, and a 24-mile diameter — therefore, a 12-mile radius — semicircle would cover much less than the vast bay formed.

Gottmann, Jan. 12, 1982, at 52-53. Likewise, Jeremy White testified:

Well, the article 7 requirements are that there shall be a deep indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and again on the premise that Long Island is part of the mainland then that is undoubtedly met. The indentation shall not be regarded as a bay unless its area is as large as or larger than the semi-circle whose diameter is a line drawn across the mouth of that indentation subject to the rules which we've talked about, about bays, islands in the mouth and whichever way you look at that I feel that that will be adequately met.

White, Nov. 12, 1981, at 147.

The Baseline Committee concluded that if Long Island was part of the mainland a juridical bay would be formed which would be closed by drawing a line from Montauk Point to Watch Hill Point. See Hodgson, Dec. 19, 1978, at 56 (U.S. Ex. 73). By reaching this conclusion, it is apparent that the Baseline Committee resolved that the indentation satisfied the semi-

circle test. Indeed, the Government, by arguing that if Long Island is found to be an extension of the mainland a line should be drawn from Montauk Point to Watch Hill Point to close the juridical bay, apparently concedes or has concluded that the resulting indentation satisfies the semi-circle test.

The Special Master concludes, based on the uncontradicted evidence and the Special Master's independent observation that the indentation formed by Long Island and the northern shore contain a huge area of water, that the semi-circle test of Articles 7(2) and 7(3) is satisfied no matter where the mouth of the indentation is located.

F. CLOSING LINE OF THE BAY

Having concluded that Long Island Sound is a well-marked indentation into the mainland and this indentation, no matter where its mouth is located, satisfies the semi-circle test of Article 7(2), it is now necessary to establish the proper closing line for the bay.

The United States argues that if Long Island Sound and Block Island Sound form a juridical bay, the bay is closed by a line connecting Montauk Point on Long Island and Watch Hill Point, Rhode Island. Only the western portion of Block Island Sound is included as part of the bay with this line. The Government argues that the waters east of this line are *not* a part of the bay because they are not within an indentation and they are not landlocked. This line, according to the Government, is the natural entrance, or mouth, to the bay.

Rhode Island and New York submit that the bay formed by Long Island Sound and Block Island Sound is closed by lines connecting Montauk point on Long Island with a point near Southwest Point on Block Island, and Sandy Point on Block Island with Point Judith, Rhode Island.³⁸ This closing

³⁸ Jeremy White testified that the bay should be closed by lines connecting Montauk Point on Long Island and with Lewis Point on Block Island and Sandy Point on Block Island with Point Judith, Rhode Island. See White, Nov. 12, 1981, at B-73. See also R.I. Ex. 1(d).

line includes all Block Island Sound as part of the bay. They argue that Block Island creates two mouths to the bay and as such the Convention dictates that Block Island be included in the line closing the bay.

The Convention provides some guidance with respect to drawing the closing lines of a bay. First, Articles 7(3), 7(4), and 7(5) indicate that the closing line of a bay is to be drawn between the "natural entrance points" of the indentation. The Convention does not further define natural entrance points but the concept is probably must aptly defined by its own terms; that is, the natural entrance points to an indentation are those headlands that naturally mark the seaward limit of the waters of the indentation.³⁹ Second, Articles 7(4) and 7(5)

³⁹ Several text writers have attempted to formulate workable definitions for natural entrance points. Aaron Shalowitz, in *1 Shore and Sea Boundaries* (1962), defines natural entrance points as "the apex of a saillent of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast." *Id.* at 63-64. Mitchell Strohl, in *The International Law of Bays* (1963), defines natural entrance points as "the points at which the coastline can most reasonably be said to turn inward to form an indentation or bay." *Id.* at 68. Robert Hodgson and Lewis Alexander, in *Towards an Objective Analysis of Special Circumstances*, Occasional Paper No. 13, (U.S. Ex. 40), define the concept as "the point where the two dimensional character of a bay . . . is replaced by that of the 'sea' or 'ocean.'" *Id.* at 10.

Additionally, three objective tests have been formulated to assist in selecting the natural entrance points: (1) the forty-five degree test; (2) the bisector of the two tangents test; and (3) the shortest distance test. Hodgson, Dec. 19, 1978, at 6-7; Dolan, Nov. 9, 1981, at 118-19. The tests are designed to determine where the direction of the shore changes from one facing the bay to one facing the sea. The primary test is the forty-five degree test. This test requires that two opposing mainland-headland points be selected and a closing line drawn between them. Lines are then drawn from each selected headland to the next inward (or landward) headland. If the resulting angles between the closing line and the two lines drawn to the inland headlands is more than 45° these mainland-headlands are the natural entrance points to the bay. If any resulting angle is less than 45°, a new mainland-headland is selected and the test is repeated until both mainland-headlands pass the test. Hodgson and Alexander, *supra*, at 10; Beazley, *supra*, at 16-17. Where the shore of a bay is a smooth curve or arc such that the forty-five degree test is inappropriate, the headlands can be selected by the bisector of the two tangents test. This test requires that lines tangent to the general direction

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also specify that the closing line connecting the natural entrance points can be no more than twenty-four miles long. Article 7(5) specifies that if the distance between the natural entrance points exceeds twenty-four miles, a closing line of the proper length is to be drawn within the bay enclosing the maximum area of water possible. Third, Article 7(2) requires that the indentation enclose "landlocked" waters. The Convention does not define the term "landlocked," but a common-sense definition would require that a body of water be predominantly surrounded by land for it to be landlocked.⁴⁰ Last, Article 7(3) indicates that the closing line of a

of the curve be constructed on both the seaward and bayward sides of the coast. The angle formed at the intersection of the two tangents is bisected and the natural point is where the bisecting line meets the shore. Hodgson and Alexander, *supra*, at 10-12; Beazley, *supra*, at 17. Where there is a well-marked entrance point on one side of a bay and no identifiable headland on the other side the opposing headland can be selected by the shortest distance method; simply locate the closest point of land opposite the well-marked entrance point. Strohl, *supra*, at 62-63. The Baseline Committee applied these tests in selecting headlands. See Dolan, Nov. 9, 1981, at 116-19.

Robert Smith testified that "the overall purpose of these tests . . . is to look for the natural entrance point that will result in a line that separates the landlocked waters from those waters which are not landlocked." Smith, Nov. 10, 1981, at 2-13. See also, *id.*, at 77-78.

The Supreme Court has recognized that where there is no readily identifiable natural entrance point an objective test must be employed to select an appropriate headland. In its Supplemental Decree in *United States v. California*, 382 U.S. 448 (1966), the Court stated:

In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. Where there is no pronounced headland, the line shall be drawn to the point where the line of mean lower low water on the shore is intersected by the bisector of the angle formed where a line projecting the general trend of the line of mean lower low water along the open coast meets a line projecting the general trend of the line of mean lower low water along the tributary waterway.

382 U.S. at 451.

⁴⁰ Robert Hodgson testified, "The primary test the [Baseline Committee] used to determine the bay was whether it enclosed landlocked waters." Hodgson, Dec. 19, 1978, at 7 (U.S. Ex. 73).

The Convention does not define "landlocked," but several text writers have attempted to formulate workable definitions for the term. Hodgson
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bay can include islands when the islands cause the indentation to have more than one mouth.

Thus, the Convention directs that the closing line of a bay be a line no more than twenty-four miles long that connects the natural entrance points of the indentation and the line must enclose within the indentation landlocked waters. Additionally, the closing lines can include islands, if the islands cause the bay to have multiple mouths.

and Alexander state the following with respect to landlocked:

The second consideration for the determination of bay is that it contains land-locked waters. *The concept of land-locked is imprecise and, as a result, may call for subjective judgments.* The semi-circular test. . . , may relate also to the character of waters being land-locked as well as to the determining of a well marked indentation. The test places an absolute, minimum limit on what can be recognized as satisfying these requirements. . . .

A semi-circle, by definition, is twice as wide as it is deep. The opening represents the maximum width. Since this definition characterizes the absolute minimum, true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay. . . .

However, since most bays are not circular other factors influenced by the shape of the body of water may be considered. The scale of the body must also be considered. Basically, *the character of the bay must lead to its being perceived as part of the land rather than of the sea.* Or, conversely, *the bay, in a practical sense, must be usefully sheltered and isolated from the sea.* Isolation or detachment from the sea must be considered the key factor.

This factor naturally relates directly both to shape and scale.

Hodgson and Alexander, *supra*, at 6, 8 (emphasis added). Beazley adopted a similar approach. He stated:

The term 'landlocked' to a seaman implies both that there shall be *land in all but one direction and also that it should be close enough, at all points to provide him with shelter from all but that one direction.* But shelter is a function of distance from shore, and if the bay be very large it will not afford that shelter. A bay with a 24 mile wide entrance is already exceeding the sort of distance that could be considered small enough, but the article places no restriction on the width of the entrance when determining the existence of a bay; it only imposes a twenty-four mile restriction on any baseline subsequently constructed.

Beazley, *supra*, at 13 (emphasis added).

Strohl defined landlocked similarly. He stated:

"[L]andlocked" must be given an extremely liberal interpretation. . . . It

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As indicated above, the United States argues that if Long Island Sound and Block Island Sound form a bay, the bay is closed by a line connecting Montauk Point on Long Island and Watch Hill Point, Rhode Island. See Appendix C. This closing line is slightly less than fourteen miles long. The Government argues that these points are the natural entrance points to the bay. Montauk Point is a prominent extension of land marking the southern limit of the indentation and Watch Hill Point is the first prominent point when heading west along the otherwise featureless Rhode Island coast. The

appears to the author that what would satisfy the probable intent of this rule and still permit the rule to enjoy some reasonably wide use, would be for the length of the bay, from a line across its mouth to the deepest point of penetration on the landward side, to be equal to or exceed the width of the mouth. . . . Such a proportion would honor the requirement that the bay be more than a mere curvature of the coast and the body of water would be "locked" by land in three directions. . . .

. . . It should be observed that if the body of water is truly "landlocked" the need to apply the mathematical definition is removed entirely. If we were to apply the more liberal interpretation of the term "landlocked", as proposed above, the use of the mathematical formula is unnecessary.

Strohl, *supra*, at 56-57 (emphasis added).

Language in *United States v. Louisiana* also indicates that the landlocked requirement of Article 7(2) is not to be strictly applied but is to be given a more liberal interpretation. The Court stated:

Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea.

394 U.S. at 61.

Additionally, the Court's discussion of the semi-circle test in the *Louisiana* case suggests that a bay will be considered landlocked even if it is bounded by territorial waters and open seas on one side, and on another side by another body of water which is internal waters. See generally 394 U.S. at 48-53. The fact that a bay is bounded by another body of internal waters on one side will not destroy the otherwise landlocked character of the waters.

Three witnesses also attempted to define landlocked. Robert Smith, testifying for the United States, stated that a body of water is landlocked when it is "predominantly surrounded by the mainland coast." Smith, Nov. 10, 1981 at 123. Derek Bowett, also testifying for the United States, stated that a body of water must be surrounded by land on three sides to be landlocked. Bowett, Nov. 11, 1981, at 65. Jeremy White, testifying for Rhode Island, stated that a ship entering a bay is landlocked if there is "land in all directions but seaward." White, Nov. 12, 1981, at 165.

Government asserts that a line connecting these points marks the natural entrance, or mouth, of the bay. The waters to the west of this line are landlocked and conversely, according to the Government, the waters to the east of this line are not landlocked. Likewise, the waters west of this line are within a well-marked indentation and the waters east of this line are not within an indentation.

The United States argues that under the Article 7(3) provision for islands creating multiple mouths to a bay, Block Island does not cause the bay to have two mouths and cannot be included in a closing line. The Government argues that for an island to cause a bay to have multiple mouths it must be intersected by a line connecting the mainland headlands.⁴¹ The Government relies on *United States v. Louisiana* to argue that the closing line cannot be drawn to an island seaward of a line connecting the mainland headlands. In *United States v. Louisiana*, the Court stated:

Just as the "presence of islands at the mouth of an indentation tends to link it more closely to the mainland," so also do the islands tend to separate the waters within from those without the entrance to the bay. Even waters which would be considered within the bay and therefore "landlocked" in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands. It would be anomalous indeed to say that waters are part of a bay even though they

⁴¹ The United States recognizes only three situations where islands may be utilized in drawing bay closing lines. First, when an island is intersected by a direct line between the mainland headlands, the island will form a new entrance to the bay and form a part of the line. Second, when an island is closely related and associated with an adjacent mainland headland, the island may itself constitute a headland of the bay. Third, when an island or group of islands "screen" the mouth of a bay such that they block more than one-half of the opening they will be considered to form the natural closure to the bay even if they are not situated immediately in the mouth of the bay. U.S. Post Trial Reply Brief at 11. See also Smith, Nov. 10, 1981, at 40-50. This view is also adopted by Hodgson and Alexander. See Hodgson and Alexander, *supra*, at 12-20. Block Island clearly does not qualify as a headland or screening island.

lie outside its natural entrance points. No doubt there could be islands which would not, whether because of their size, shape, or relationships to the mainland, be said to create more than one mouth to the bay.

394 U.S. at 58.

The Baseline Committee also took the view that if an island was not intersected by a line connecting the mainland headlands, the island would not affect the location of the baseline. *See Dolan*, Nov. 9, 1981, at 116-17.

Based on this interpretation of Article 7(3), the Government argues that Block Island is too far seaward of a line connecting any conceivable mainland headlands to be included in the closing line of the bay. The Government also argues that to draw the closing line of the bay to include Block Island would be tantamount to using straight baselines to close the bay.

Rhode Island and New York argue that all of Block Island Sound is included within the bay and the bay should be closed by lines connecting Montauk Point with a point near Southwest Point on Block Island, and Sandy Point on Block Island with Point Judith, Rhode Island. *See Appendix C*. The line connecting these points is approximately twenty-two miles long. They argue that Block Island Sound, when considered with Long Island Sound, satisfies the Article 7 criteria, and thus, Block Island must be included in the closing line of the bay.

In support of their position, the States argue first that Block Island Sound contains landlocked waters. They contend that Block Island and the submerged obstacles located between Montauk Point and Block Island cause the water of Block Island Sound to be landlocked.⁴²

⁴² Only two witnesses testified that Block Island Sound is landlocked. Jean Gottman, the professor of geography at the University of Oxford in England who testified for New York, concluded that Block Island Sound

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Next, the States argue that Article 7(3) of the Convention allows closing lines to be drawn to islands seaward of a line connecting the mainland headlands as long as the island creates multiple mouths to the bay. They rely on the actual wording of Article 7(3) to support this point. Article 7(3) provides:

Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

Indeed, in *United States v. Louisiana*, the Supreme Court recognized that "Article 7(3) contains no requirement that islands be intersected by a mainland-to-mainland closing line; rather it speaks only of multiple mouths 'because of the presence of islands.'" 394 U.S. at 59 n.79. The States also rely on Aaron Shalowitz who proposed drawing closing lines to a seaward island in *1 Shore and Sea Boundaries* (1962). He stated:

Another facet of the closing-line rule that requires interpretation is where islands are situated close to

is landlocked by Long Island, Block Island, and the continent, and that the "sill" between Montauk Point and Block Island caused the waters of Block Island Sound to have a "different character" than the waters outside Block Island Sound. Gottman, Jan. 12, 1982, at 88-91.

Jeremy White developed an objective test for determining when a body of water is landlocked. His test is based on the observation that if a ship is on the closing line of a bay (the line separating the landlocked waters of the bay from the water external to the bay), the angle between the ship and the two headlands, using the ship as the vertex of the angle, is 180 degrees. If the ship proceeds into the bay the angle formed on the seaward side is less than 180 degrees. White, thus, concludes that any point in a bay is landlocked when the sea area, or area of sea horizon, is less than 180 degrees. White, Nov. 12, 1981 at B-1 to B-13, Nov. 13, 1981 at C-54 to C-59. According to White, the test also works when there is an island in the mouth of the bay. The test takes into account the size, shape, and orientation of the island, how far seaward the island is, and how far the island is situated from the headlands of the bay. See *id.* White applied the test to Block Island Sound and found it to be landlocked. White, Nov. 12, 1981, at B-8 to B-13. See R.I. Ex. 1(d), 1(e) and 1(f).

The Special Master attaches no weight to the test White developed for determining when a body of water is landlocked, or White's conclusions.

the entrance of an indentation that satisfies the semicircular rule for bays. How is the closing line to be drawn where an island lies to the landward of the line joining the headlands? And what is the treatment for an island lying to seaward of such line? Neither situation is provided for in the convention or in the draft rules of the ILC. A reasonable interpretation would be to draw a direct line between headlands for the first case . . . , but to the island from each headland for the second case. . . .

Shalowitz, *supra*, at 225 (R.I. Ex. 18). In a note to the above passage, Shalowitz stated:

The Basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland. . . . It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible, and with par. 3 of the article which allows islands within an indentation to be considered part of the water area. The rule proposed would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule. The best solution would be to consider each case on its merits and apply a rule of reason. A more restrictive rule for the second case would be to join the island to each headland only if some part of the island is on a direct headland-to-headland line. This would also be in the interest of least encroachment on freedom of the seas.

Id. at 225 n.38.⁴³

⁴³ Rhode Island also asserts that White's angles test for landlocked waters, *see supra* note 42, can be used to move a closing line out to a seaward island. Rhode Island argues that if the waters landward of the island pass White's test, then the island can properly be included in the closing line of the bay.

Lastly, the States argue that factually Block Island creates two mouths to the bay.⁴⁴ Rhode Island's evidence on this point indicates that ships heading into the two sounds pass to the north of Block Island, between Block Island and Point Judith, and do not normally traverse between Block Island and Montauk Point. The water lying between Block Island and Montauk Point is not used by ships since there is a heavy swell in the area and there are submerged hazards between the two islands. *See* Neary, Nov. 13, 1981, at C-92 to C-94.

The Baseline Committee considered where the closing line of the bay would be, assuming arguendo, that the two sounds were a juridical bay. The Committee considered closing the bay (1) from Montauk Point to Watch Hill Point; (2) from Montauk Point to Point Judith, Rhode Island; and (3) from Montauk Point to Block Island and Block Island to Point Judith, Rhode Island. U.S. Ex. 18, 19; Dolan, Nov. 9, 1981 at 61. *See* Appendix C. The Committee concluded that if Long Island Sound and Block Island Sound formed a juridical bay it would be closed between Montauk Point and Watch Hill Point. Dolan, Nov. 9, 1981, at 62, 134-35; Hodgson, Dec. 19, 1978, at 51-56. *See* U.S. Ex. 18. The Montauk Point to Point Judith closing line was rejected because the line exceeded twenty-four miles. Dolan, Nov. 9, 1981, at 62. A closing line from Montauk Point to the Point Judith harbor works, which would be less than twenty-four miles long, was rejected because the Committee had some doubts about using man-made harbor works as the headland of a bay. *Id.* at 62, 122.⁴⁵

⁴⁴ New York also argues that if the closing line urged by the states is not accepted, New York and Rhode Island, as well as the United States, will be deprived of their fundamental "jurisdictional rights."

⁴⁵ Two witnesses contradicted the Baseline Committee's conclusion that closing lines should not be drawn to man-made harbor works. Jean Gottman testified that Article 8 of the Convention allows closing lines to be drawn to harbor works. Gottman, Jan. 12, 1982 at 55, 69-70. Article 8 provides:

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Robert Smith testified that using harbor works as headland presented

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The Committee rejected these closing lines and the closing lines to Block Island, because the Committee concluded that east of a Montauk Point to Watch Hill Point line there is no indentation, the waters are not landlocked, and the nature of the coast did not permit a determination that the waters were part of a bay. *Id.* at 120-21, 126.

On this question the Special Master agrees with the findings of the Baseline Committee and concludes that the closing for the bay is a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island. Montauk Point is one prominent point marking the separation between the waters within the indentation and the waters outside the indentation, and is the clear natural entrance point on the south side of the indentation. Watch Hill Point is the first prominent point on the Rhode Island coast, it is almost due north of Montauk Point, and it also marks the separation between the waters within the indentation and the waters outside the indentation, thus, Watch Hill Point is the logical natural entrance point on the north side of the indentation.

The parties agree that the waters on Long Island Sound are landlocked and it is clear that the waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while the waters east of this line are not landlocked. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea. Upon viewing charts of the area, there is no perception that these waters are part of the land rather than open sea.

no problems under the Convention. Smith, Nov. 10, 1981, at 130.

Jeremy White considered a Montauk Point to Point Judith harbor works closing line and rejected the line because the harbor works did not satisfy the forty-five degree test for selecting headlands. White, Nov. 13, 1981, at C-52.

The Special Master does not find it necessary to decide whether harbor works can be used as headlands. The Point Judith harbor works and Point Judith are not appropriate headlands of the bay because they do not mark the entrance to the indentation but are located well outside the indentation. Additionally, a closing line drawn to either point would enclose waters that are not landlocked.

Conversely, the waters west of Montauk Point and Watch Hill Point satisfy all the criteria for being landlocked. Long Island Sound and Block Island Sound west of Montauk Point and Watch Hill Point are surrounded by land on all but one side and are usefully sheltered and isolated from the sea. The waters west of a line connecting Montauk Point and Watch Hill Point are landlocked.

Block Island cannot be included in the closing line of the bay for several reasons. First, Block Island is located well outside the indentation which begins at the Montauk Point to Watch Hill Point Line. Second, if the closing line included Block Island, there would be waters inside the closing line which are not landlocked. Third, the natural entrance or mouth to the indentation is along the Montauk Point to Watch Hill Point line and Block Island does not form the mouth to the bay or cause the bay to have multiple mouths. Last, Block Island is too far seaward of *any* mainland-to-mainland closing line to consider altering the closing line to include Block Island.⁴⁶

Therefore, the Special Master concludes that the natural mouth to the indentation which is formed by Long Island being treated a part of the mainland, lies between Montauk Point on Long Island and Watch Hill Point, Rhode Island, and the indentation is closed by a line connecting these two points.

VI. CONCLUSION

The Special Master finds that Long Island Sound and Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island, is a juridical bay

⁴⁶ Since Block Island is too far seaward to have a closing line drawn to it even under Shalowitz's proposition, it is not necessary to decide whether under Article 7(3) an island must be intersected by a line connecting the mainland headlands of a bay before it will cause the indentation to have more than one mouth and the island will be included in the closing line of the bay.

under Article 7 of the Convention on the Territorial Sea and Contiguous Zone. This juridical bay is closed by a line connecting Montauk Point and Watch Hill Point. The Special Master also finds that Block Island Sound is *not* a historic bay under Article 7(6). Thus, the waters west of the closing line to the juridical bay are internal state waters and the waters east of this closing line are territorial waters and high seas.

Based on the foregoing, the Special Master concludes that the legal coastline (or baseline) in the disputed area is the ordinary low water line along the mainland beginning at the Massachusetts and Rhode Island border to a point off Sakonnet Point, then a straight closing line west to Point Judith, then the ordinary low water line along the mainland to Watch Hill Point, then a straight closing line south to Montauk Point on Long Island. The legal coastline of Block Island is the ordinary low water line around Block Island. The territorial waters of the United States are measured from this baseline.

VII. RECOMMENDATIONS

The Special Master recommends that the parties be directed to submit to the Court forms of a declaratory decree in accord with the foregoing findings and conclusions and drawn with the necessary technical precision to carry them fully into effect.

The decree should provide that each party bear its own costs and that the actual expenses of the Special Master be borne by the parties in equal shares. It should also reserve the jurisdiction of the Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to supplement the decree and give it proper force and effect.

Respectfully submitted,

Walter E. Hoffman
Special Master

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 35, Original

APPENDIX A

STIPULATION OF PARTIES

No. 35, ORIGINAL

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE (RHODE ISLAND AND NEW YORK),

Defendants.

BEFORE THE SPECIAL MASTER

STIPULATION

For purposes of this litigation, the United States, the State of Rhode Island and Providence Plantations and the State of New York do make the following stipulation:

1. By agreement of all parties, the United States requested Dr. Robert Smith, Office of the Geographer, Department of State, to measure certain distances specified by name.

2. To conduct these measurements, Dr. Robert Smith utilized the charts identified on Attachment I to this stipulation, and selected points in the vicinity of the identified name which could be described by latitude and longitude. The points are also identified on Attachment I.

3. While Dr. Smith endeavored to select points which marked the geographical feature identified, no party asserts or accepts by this stipulation that the named point would, for purposes of baseline delimitation, necessarily be found at the coordinates selected.

4. Where the large scale chart indicated a possible choice of points in a named area, Dr. Smith utilized more than one point in his measurements. These measurements from point to point are identified in Attachment II to this stipulation.

5. With the above caveats, the parties agree that the measurements identified on Attachments I and II are accurate.

Respectfully submitted,

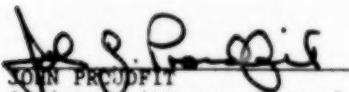
FOR RHODE ISLAND


J. PETER DOHERTY
Special Assistant Attorney
General

FOR THE UNITED STATES


MARGARET N. STRAND
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D. C. 20503

FOR NEW YORK


JOHN P. DOHERTY
Assistant Attorney General

Approved:


WALTER E. HOFFMANN
SPECIAL MASTER
4/23/82

Attachment I

Charts and Basepoints

NOS 13219, 1:15,000 (5th ed., Jan. 3/76)

1. Point Judith

41°21'35.3"N, 71°28'53.5"W

2. Point Judith Harborworks

- a. 41°21'31.8"N, 71°29'37"W
- b. 41°21'14.4"N, 71°30'29.3"W
- c. 41°21'16.3"N, 71°30'38"W

NOS 13217, 1:15,000 (8th ed., Dec. 22/79)
Block Island

3. Sandy Point (low-water line)

41°14'27.9"N, 71°34'32.9"W

4. Point southwest of Southwest Point

41°09'14"N, 71°36'47.9"W

5. Lewis Point

41°08'47.3"N, 71°36'00"W

NOS 13209, 1:40,000 (14th ed., Feb. 17/79)

6. Montauk Point

- a. 41°04'14"N, 71°51'23"W
- b. 41°04'18"N, 71°51'24"W
- c. 41°04'23"N, 71°51'26"W

NOS 13214, 1:20,000 (21st ed., Aug. 25/79)

7. Watch Hill

41°18'12.1"N, 71°51'33"W

NOS 13215 1:40,000 (9th ed., Apr. 12/80)

8. Weekapaug, R.I.

- a. 41°19'29"N, 71°45'07"W
- b. 41°19'31"N, 71°45'09"W

NOS 12366, 1:20,000 (17th ed., Sept. 29/79)

9. Willets Point

40°47'47"N, 73°46'47"W

10. Throgs Neck

40°48'17"N, 73°47'25"W

NOS 12326, 1:80,000 (34th ed., Jan. 17/81)

11. Sandy Hook

40°28'09"N, 73°59'50"W

NOS 12350, 1:20,000 (47th ed., Dec. 27/80)

12. Rockaway Point

40°32'24"N, 73°56'29"W

NOS 13205, 1:80,000 (26th ed., Feb. 21/81)

Published Closing Lines

13. Culloden Point

41°04'24"N, 71°57'24"W

14. Orient Point

41°09'46"N, 72°13'41"W

15. SW Plum I.

41°09'58"N, 72°12'08"W

16. NE Plum I.

41°11'19"N, 72°09'46"W

17. Race Point (Fisher I.)

41°14'59"N, 72°02'20"W

18. East Point (Fisher I.)

41°17'30"N, 71°58'23"W

19. Napatree Point

41°18'19"N, 71°53'08"W

Attachment II

Distances between points; coordinates taken from referenced points in Attachment I. All distances are nautical miles.

1. Point Judith, R.I. to Sandy Point (Block Island)
point 1 to point 3 = 8.3

2. Point Judith Harborworks to Sandy Point (Block Island)
point 3 to point 2a = 8.0
2b = 7.4
2c = 7.4

3. Point southwest of Southwest Point (Block Island) to Montauk Point, N.Y.
point 4 to point 6a = 13.8
6b = 13.8
6c = 13.8

4. Lewis Point (Block Island) to Montauk Point, N.Y.
point 5 to point 6a = 12.5
6b = 12.5
6c = 12.5

5. Montauk Point, N.Y. to Point Judith, R.I.
point 6a to point 1 = 24.3
6b to point 1 = 24.2
6c to point 1 = 24.2

6. Montauk Point, N.Y. to Point Judith Harborworks
point 6a to point 2a = 23.8
point 6b to point 2a = 23.8
point 6c to point 2a = 23.8

point 6a to point 2b = 23.2
point 6b to point 2b = 23.1
point 6c to point 2b = 23.1

point 6a to point 2c = 23.1
point 6b to point 2c = 23.1
point 6c to point 2c = 23.1

7. Montauk Point, N.Y. to Watch Hill, R.I.
point 6b to point 7 = 13.9
point 6c to point 7 = 13.8

8. Montauk Point, N.Y. to Weekapaug Point, R.I.
point 6a to point 8a = 16.0
point 6b to point 8a = 15.9
point 6c to point 8a = 15.8

point 6a to point 8b = 16.0
point 6b to point 8b = 15.9
point 6c to point 8b = 15.9

9. Throgs Neck, N.Y. to Willet's Point
point 10 to point 9 = 0.70
10. Rockaway Point to Sandy Hook, N.J.
point 12 to point 11 = 4.9
11. Culloden Point to Orient Point
point 13 to point 14 = 13.4
12. Orient Point to SW Plum I.
point 14 to point 15 = 1.2
13. NE Plum I. to Race Point (Fisher I.)
point 16 to point 17 = 6.7
14. East Point (Fisher I.) to Napatree Point
point 18 to point 19 = 1.9

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR ORIGINAL COPY AT THE TIME
OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED,
A NEW FICHE WILL BE ISSUED.

APPENDIX B

10

72°

507

11

2

27

PRECAUTIONARY AREAS

within the Precautionary Areas may consist of vessels making
on between operating in Ambrose or Sandy Hook Channels
the established traffic lanes; or vessels operating between
Bay and Buzzards Bay and one of the established traffic
lanes are advised to exercise extreme care in navigating within
the normal Pilot Cruising Area is outlined by a triangular

CABLE AND PIPELINE AREAS

The cable and pipeline areas falling within the areas of the larger scale charts are shown thereon and are not repeated on this chart.

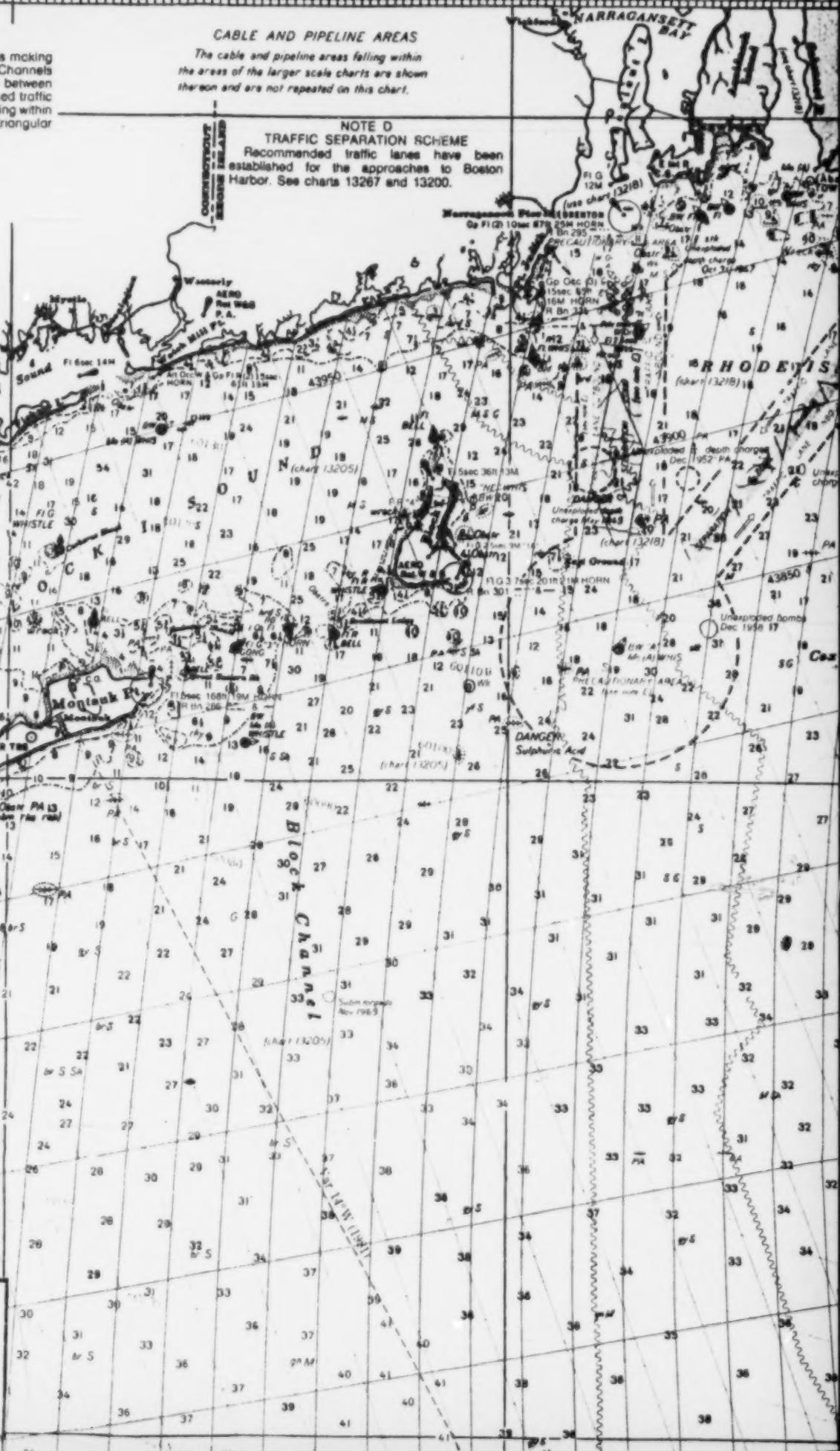
NOTE D

TRAFFIC SEPARATION SCHEME

Recommended traffic lanes have been established for the approaches to Boston Harbor. See charts 13267 and 13200.

POLLUTION REPORTS

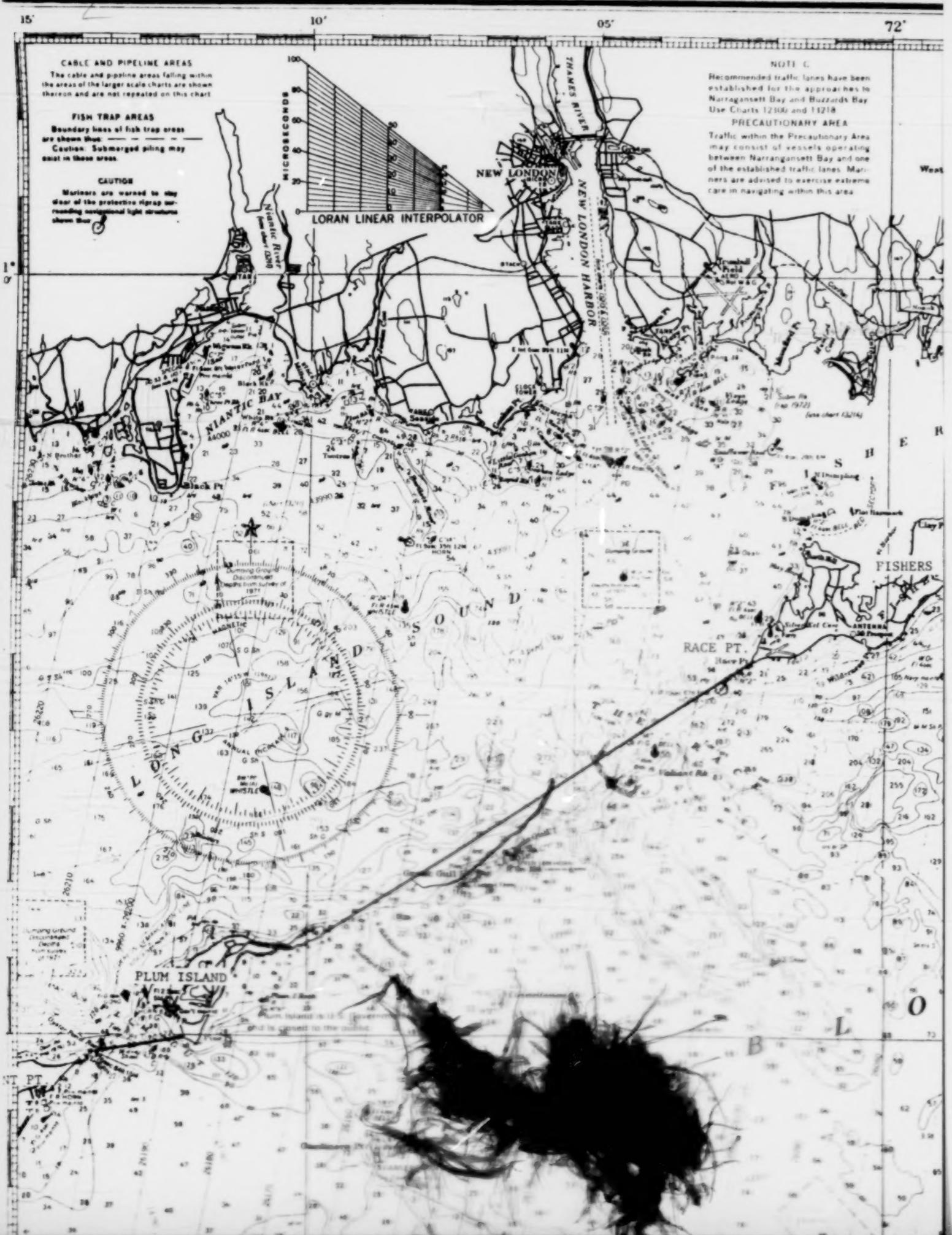
Report all spills of oil and hazardous substances to the National Response Center via 00-424-6802 (toll free), or to the nearest U.S. coast Guard facility if telephone communication is impossible (33 CFR 153).



APPENDIX B

PORTION OF CHART 12300
APPROACHES TO NEW YORK

APPENDIX C



NON REPORTS
Major and hazardous sub-
stance Response Center re-
quest or to the nearest U.S.
Coast Guard telephone communica-
tions (3 CFR 152)

40°

35°

71°30'

41°

15°

10°

LOANS CHART DATA

U

O

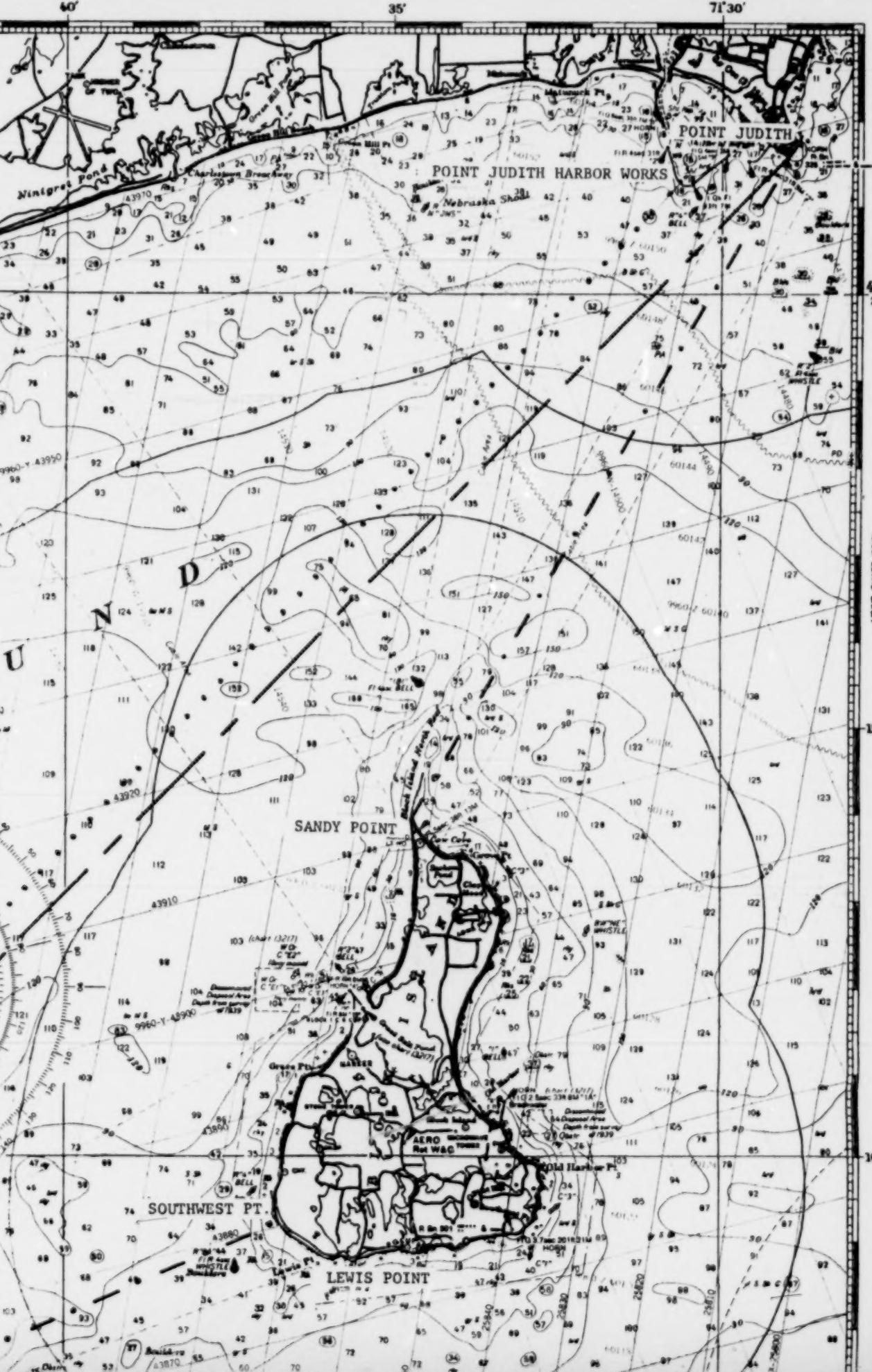
N

D

SANDY POINT

SOUTHWEST PT.

LEWIS POINT



RADAR REFLECTORS

Radar reflectors have been placed on many floating aids to navigation. Individual radar reflector identification on these aids has been omitted from the chart.

CAUTION

Only marine radiobeacons have been calibrated for surface use. Limitations on the use of certain other radio signals as aids to marine navigation can be found in the U.S. Coast Guard Light List and Defense Mapping Agency Hydrographic/Topographic Center Publication 117 (A & B).

Radio direction-finder bearings to commercial broadcasting stations are subject to error and should be used with caution.

Station positions are shown thus:

(Accurate location) (Approximate location)

ABBREVIATIONS. (For complete list of symbols and abbreviations, see Chart No. 1)

Light (lights are white unless otherwise indicated)	
F fixed	OBSC obscured
F1 rotating	WHRS whirling
QI rotating	DIA diaphone
QI group	M numerical miles
E fast rotating	1/40 interrupted flash
Buoy	C light
C can	P float
Bottom characteristics	R red
OI clay	Dr orange
M mud	G green
C sand	W white
G gravel	T yellow
S shell	Br brown
Gr grass	Bl blue
SA shells	Br blue
SA stony	Br green
SA hard	Bl red
SA rocky	Bl red
SA soft	Bl white
SA stony	Bl yellow

Depth, rock, obstruction, or shoal closest clear to the depth indicated

Routes that cover and uncover, with heights in feet above datum of soundings

AERO aerodromes R Bu. radio beacon C G. Coast Guard station

R TR. radio tower D F S distance finding station

WTH authorized. Other obstruction. PA position approximate. ED existence doubtful

HEIGHTS

Heights in feet above Mean High Water

AUTHORITIES

Hydrography and topography by the National Ocean Survey with additional data from the U.S. Coast Guard.

STORM WARNINGS

The National Weather Service displays storm warnings at the following approximate locations:
Ambrose Light (40°27'4" - 73°49'8")

For a complete list of storm warning stations, see large scale charts.

AIDS TO NAVIGATION

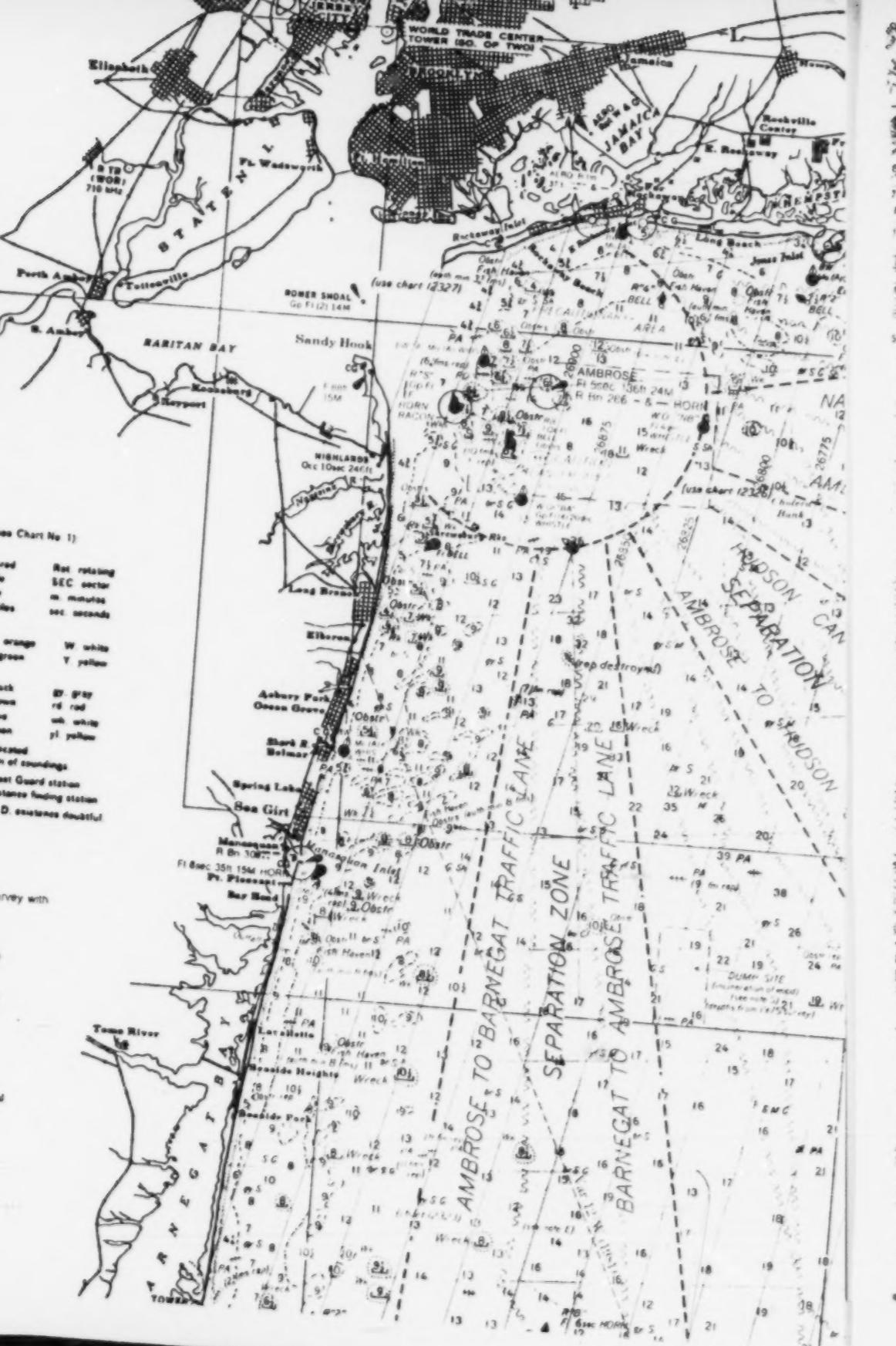
Consult U.S. Coast Guard Light List for supplemental information concerning aids to navigation.

WARNING

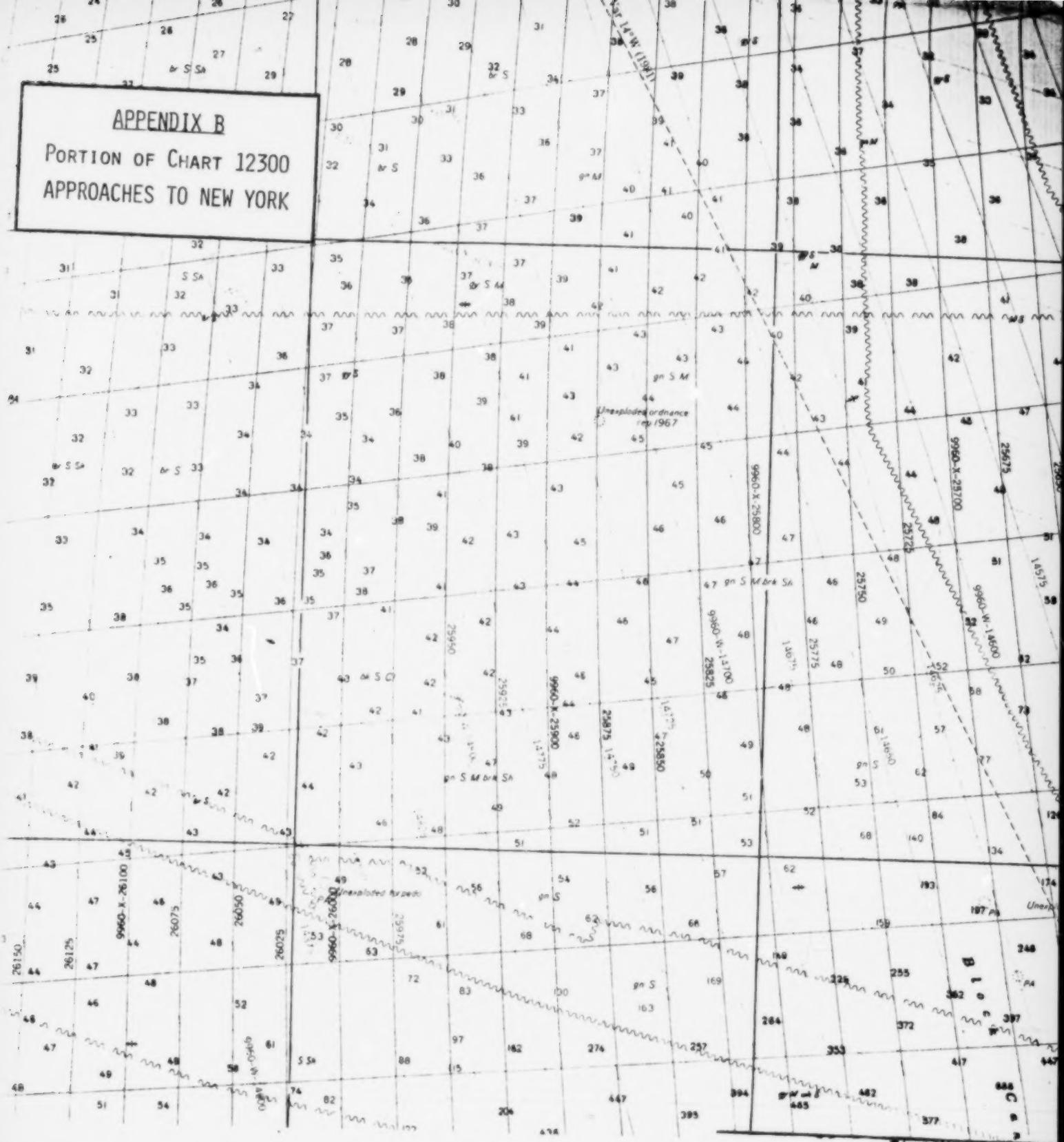
The prudent mariner will not rely solely on any single aid to navigation, particularly floating aids. See U.S. Coast Guard Light List and U.S. Coast Pilot for details.

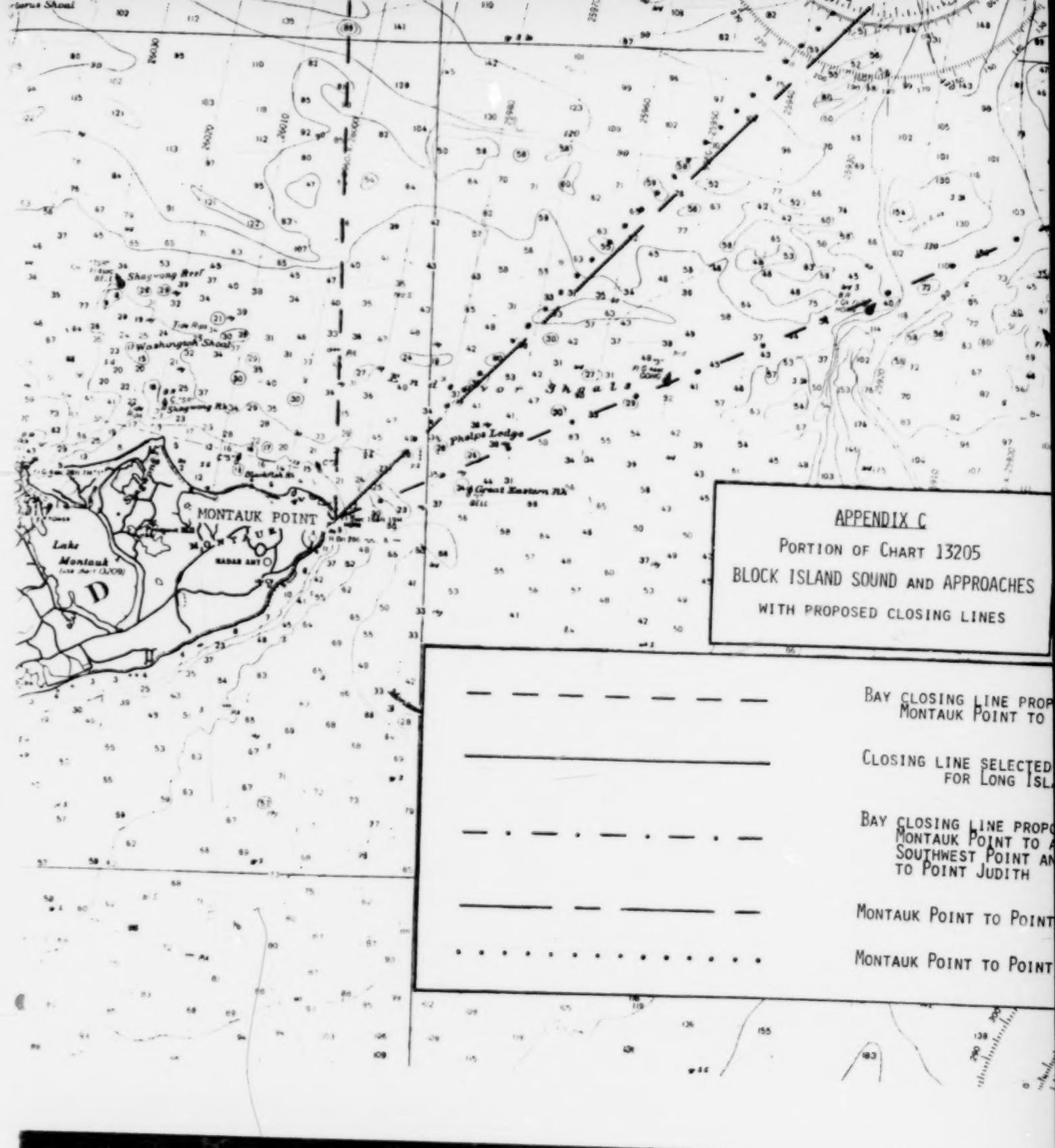
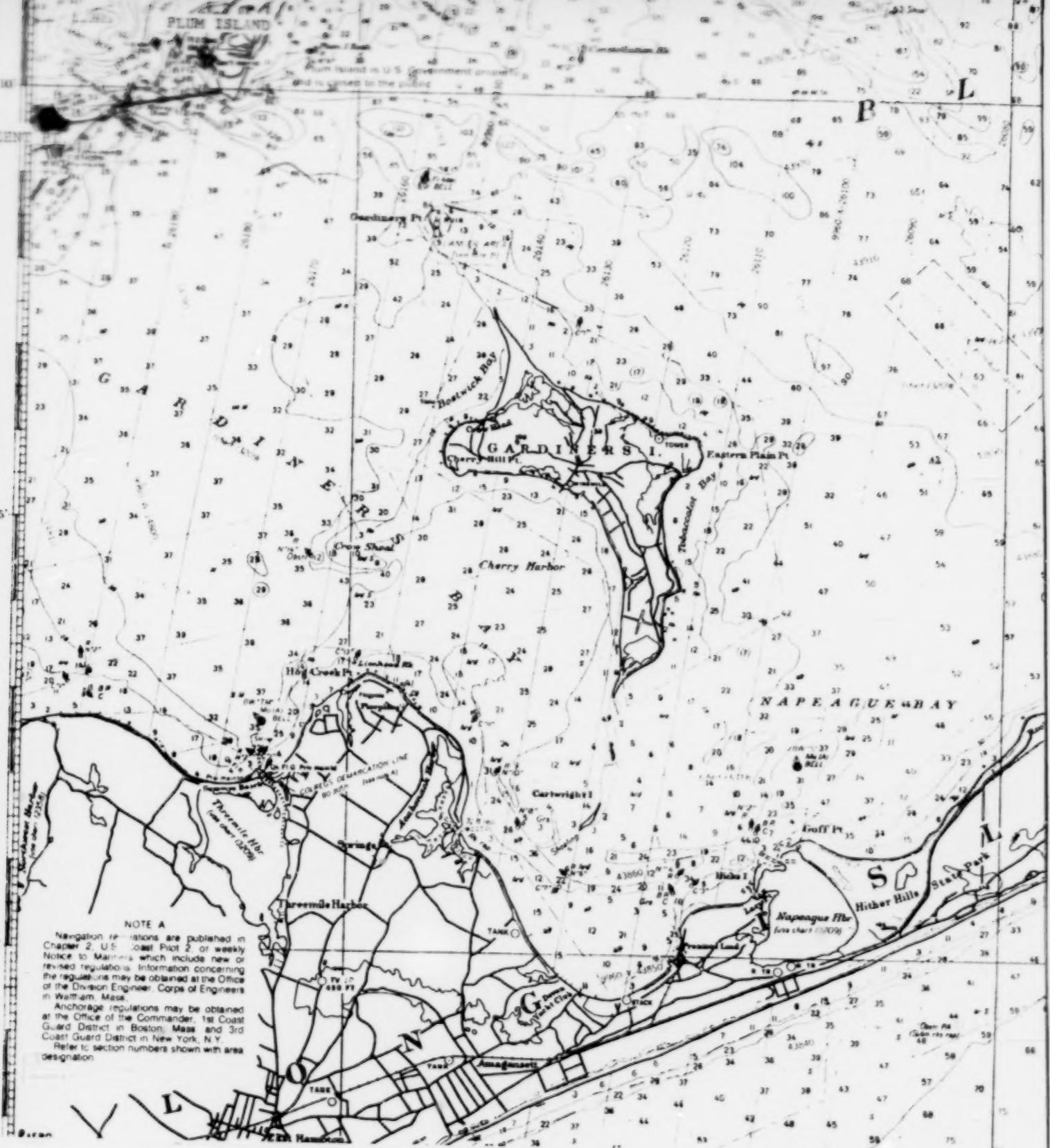
NONDANGEROUS WRECKS

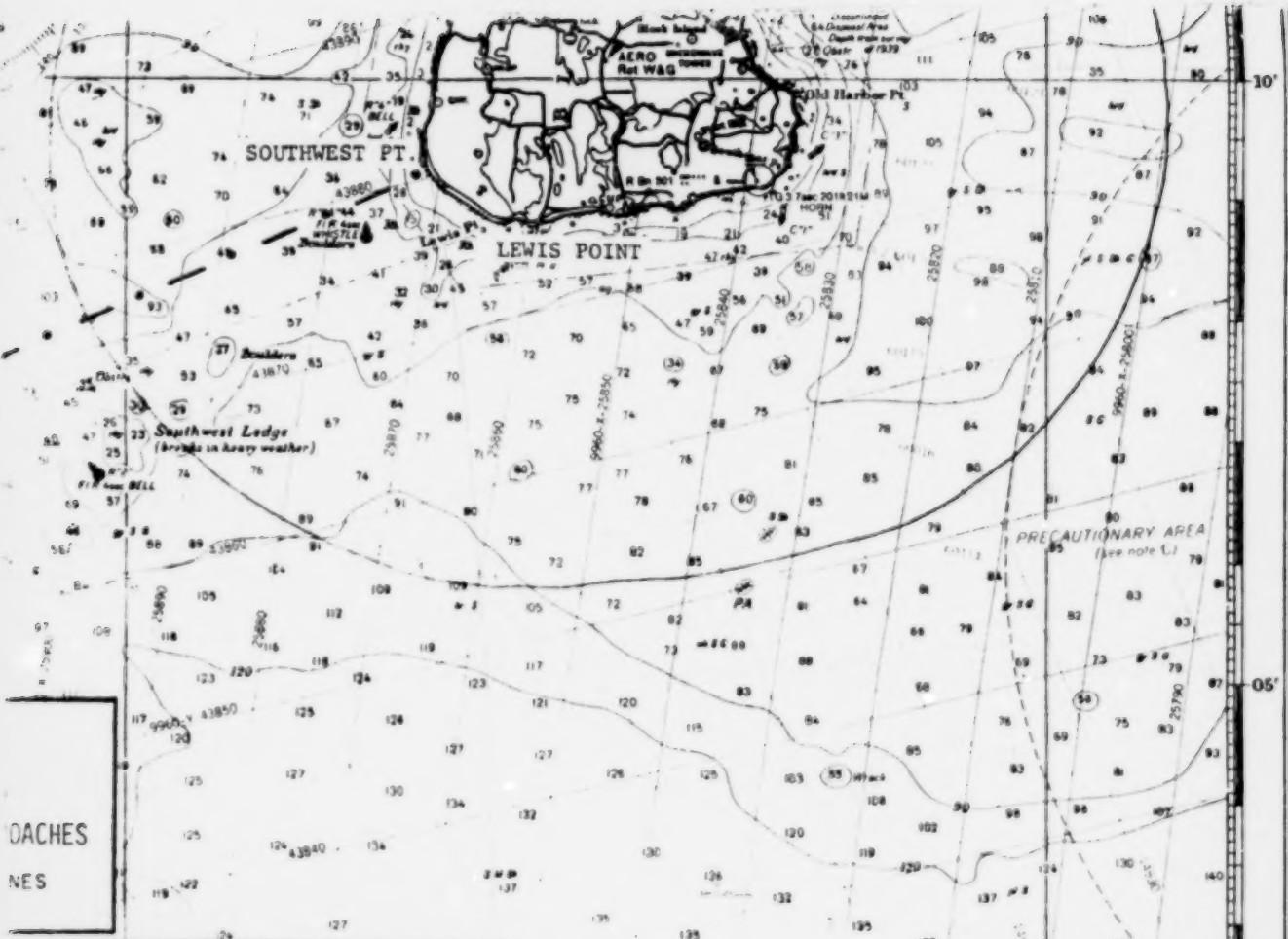
Indangerous wrecks shown on charts 12326 and 4 have been omitted from this chart. The limits on charts 12326 and 12214 are shown in outline.



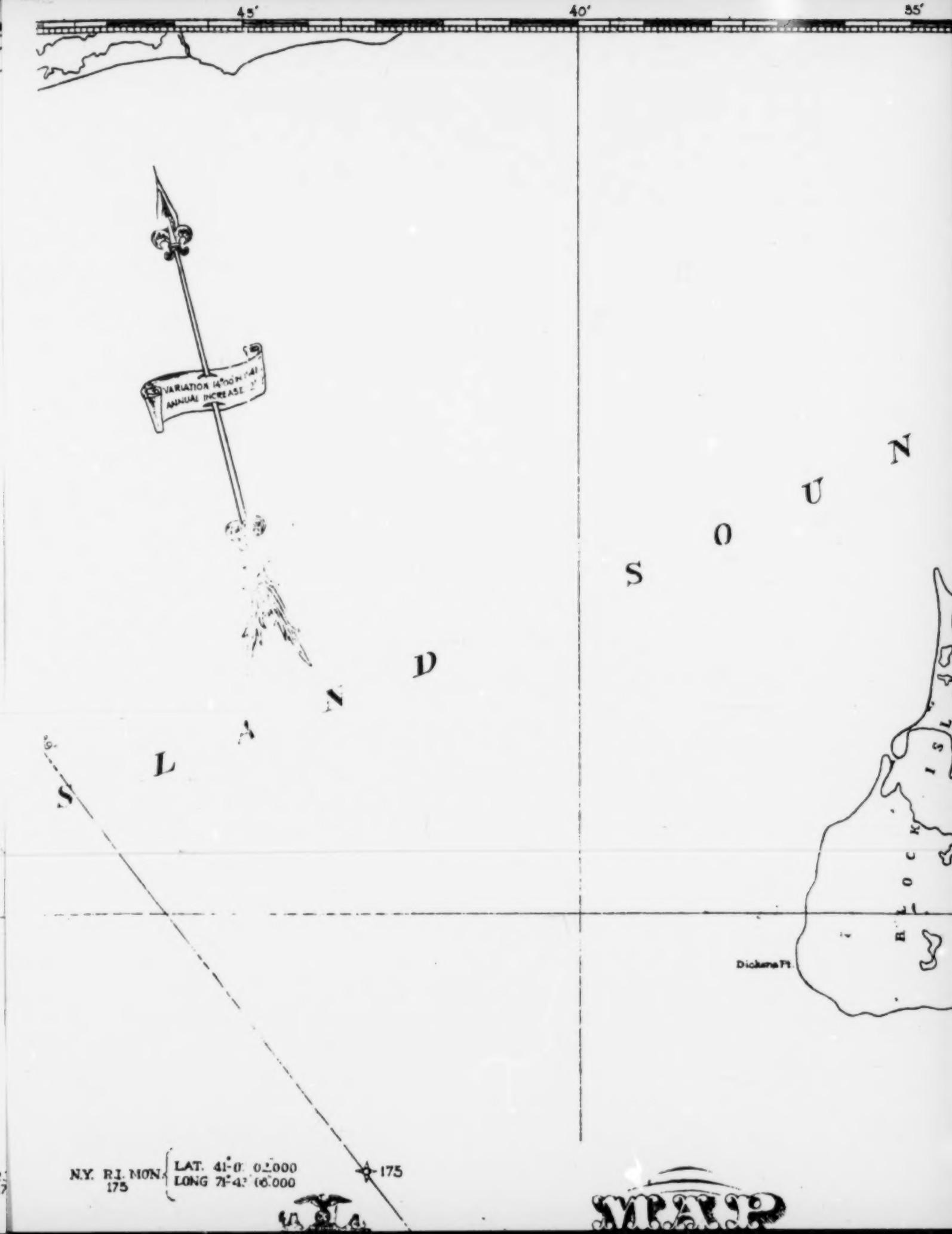
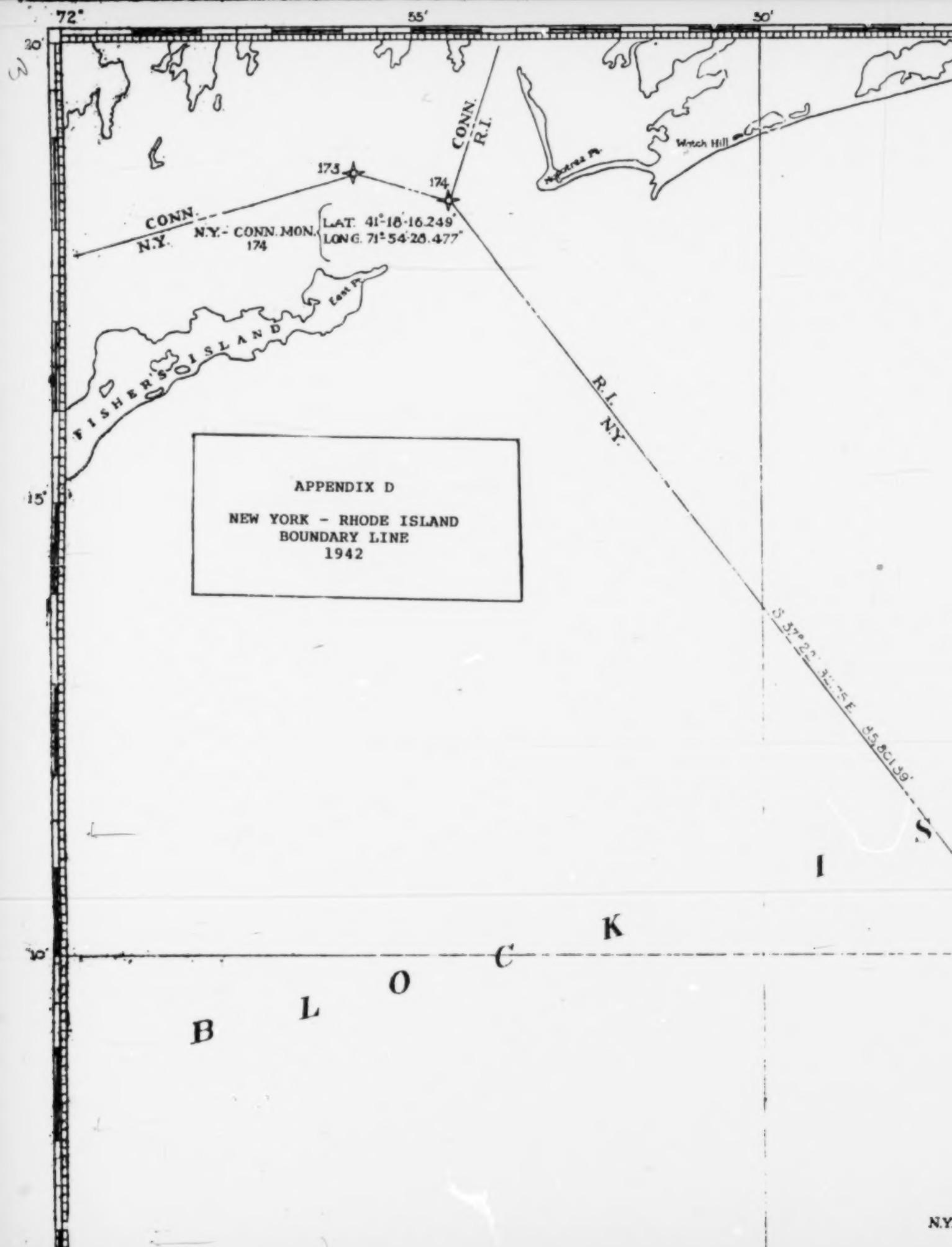
APPENDIX B
PORTION OF CHART 12300
APPROACHES TO NEW YORK







APPENDIX D



35'

77°39'

20'

15'

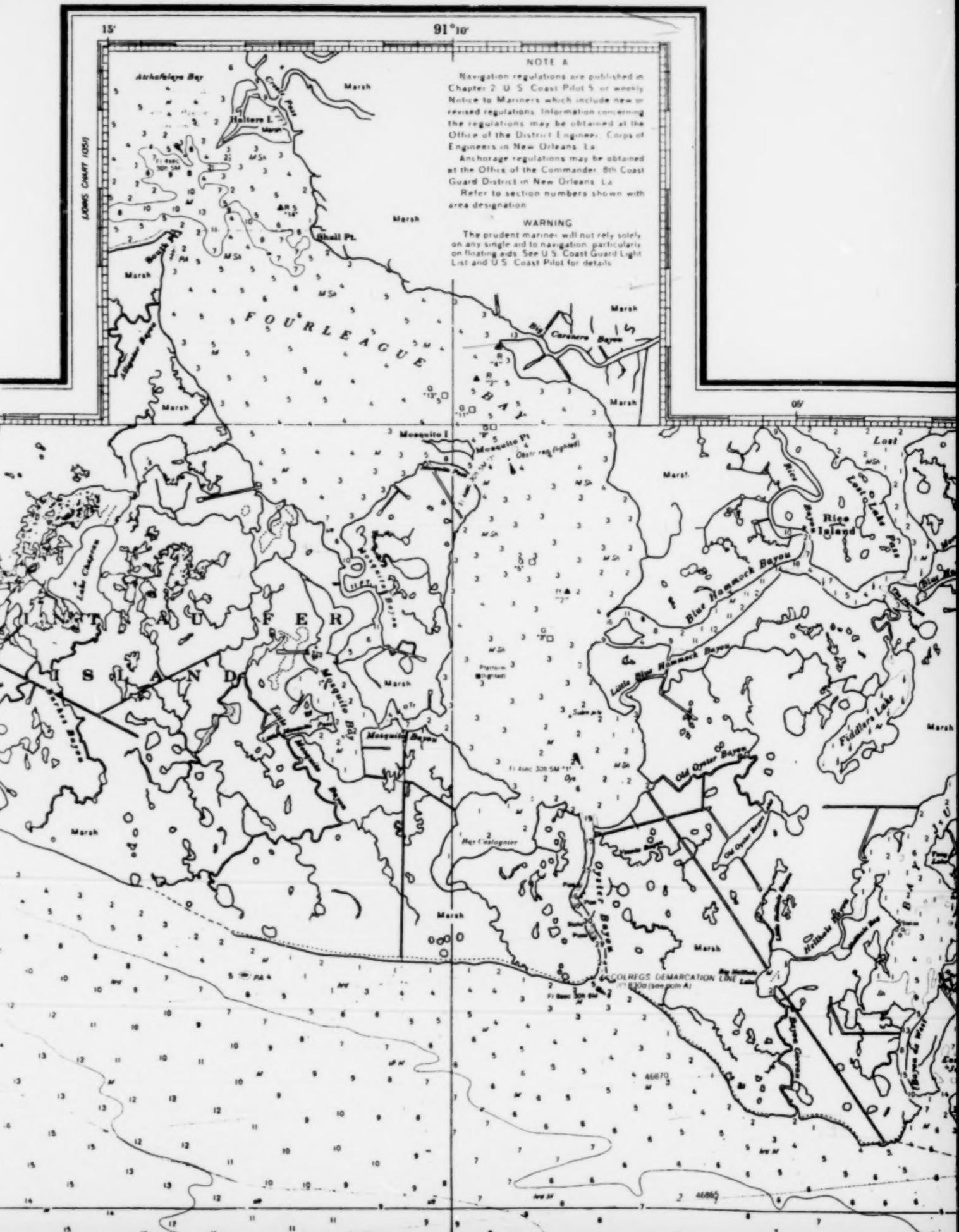
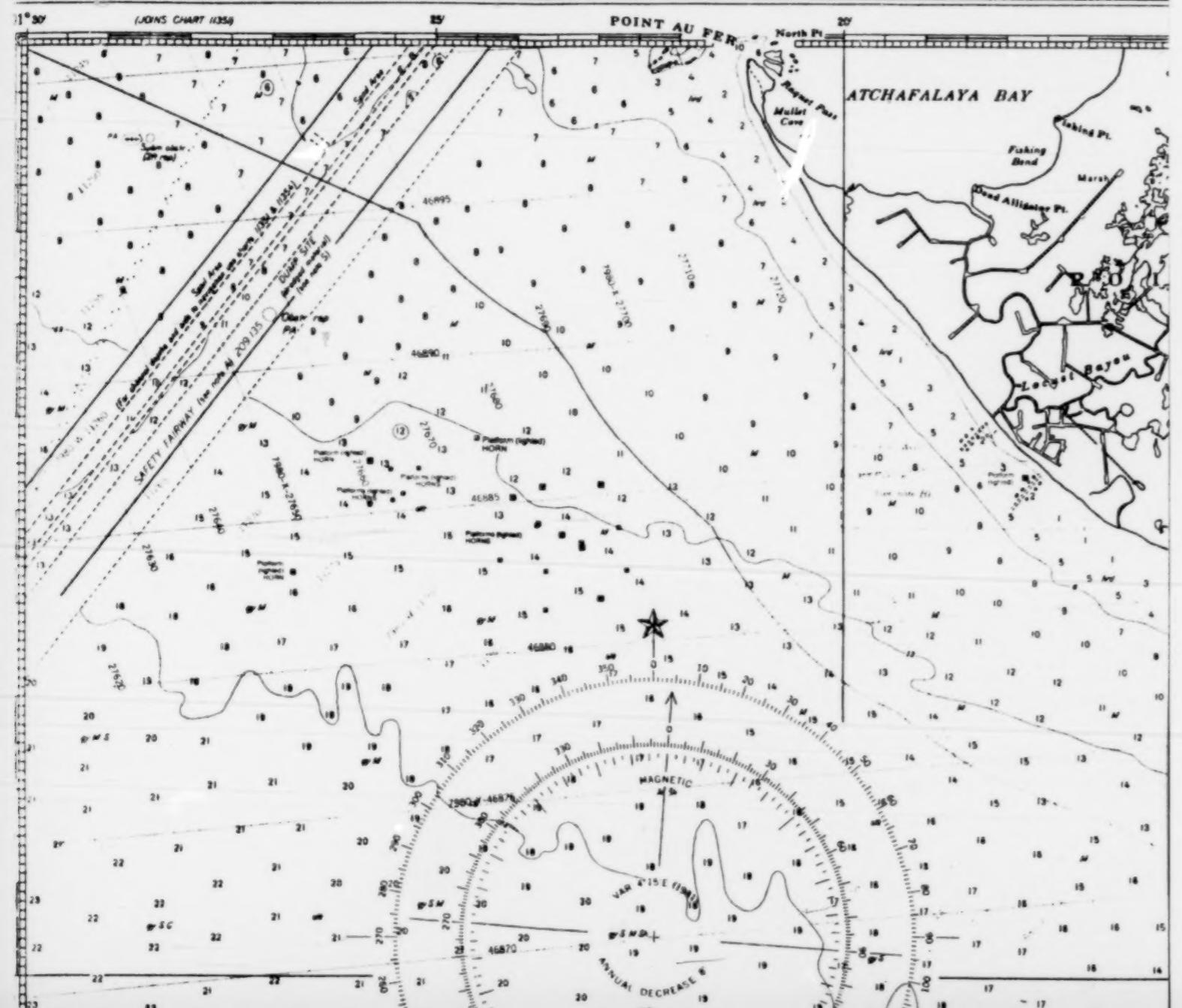
U

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D



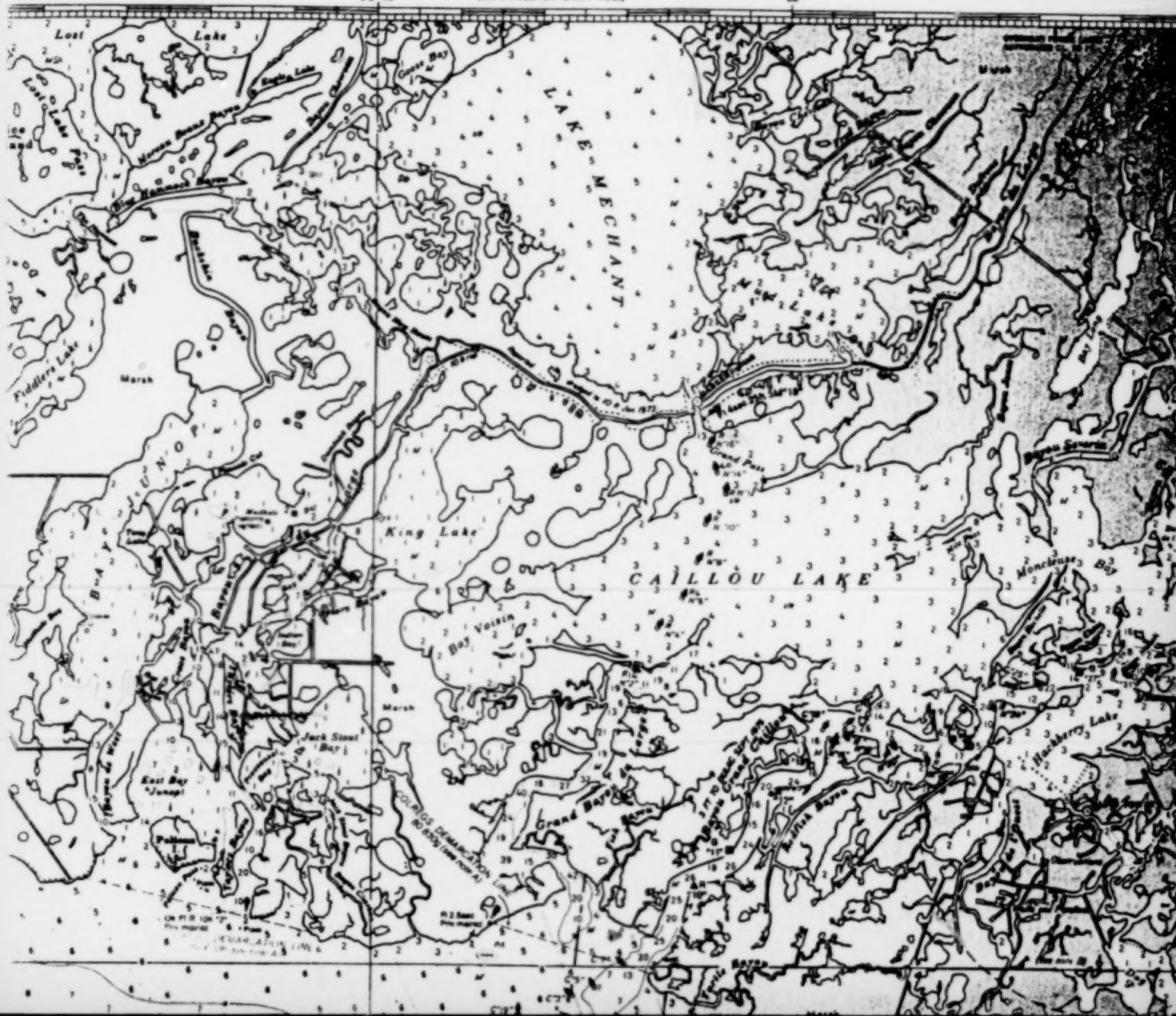
APPENDIX E

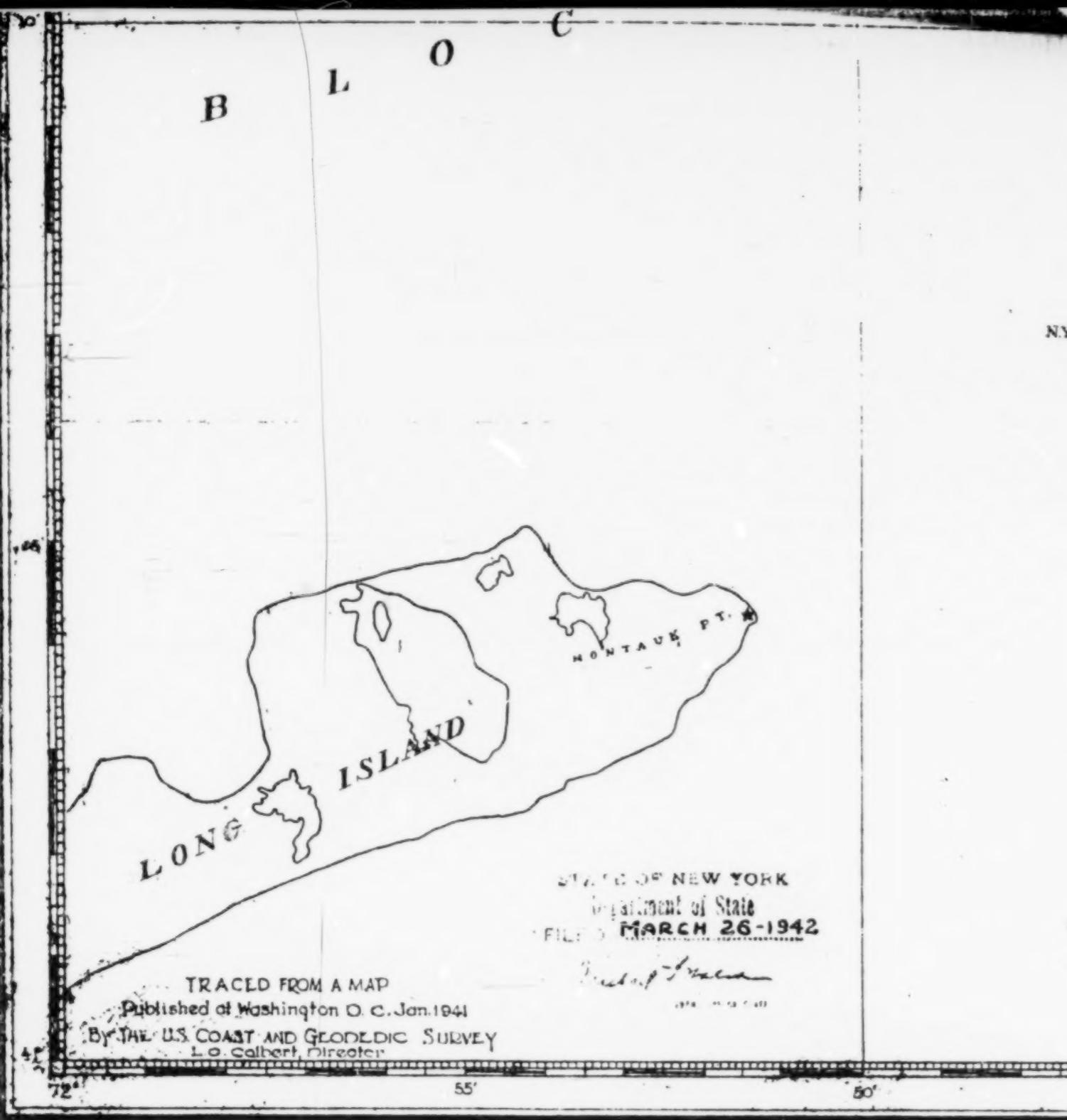


91°00'

(CONTINUED ON CHART 11352)

55°

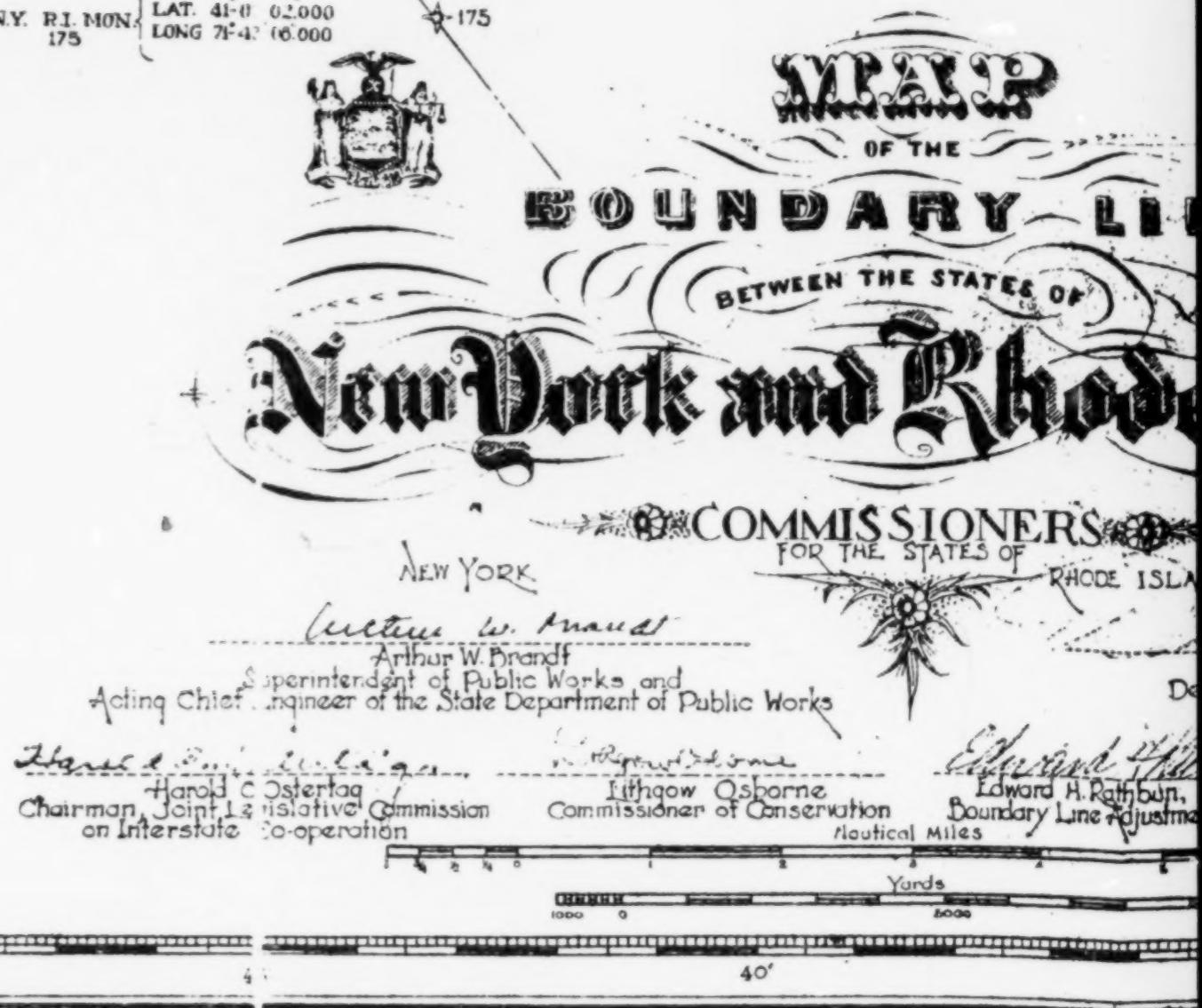


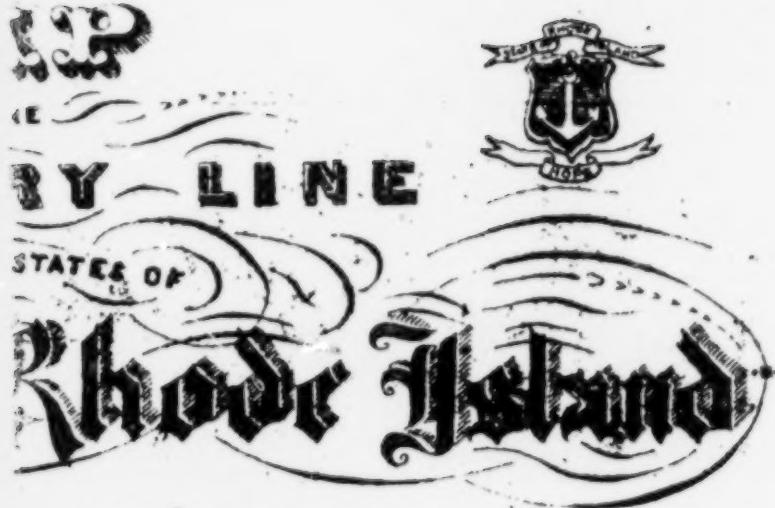


N.Y.

NY. RI. MON
 175 LAT. 41° 0' 0.000
 LONG 71° 42' 0.000

175





ONERS
TIES OF
RHODE ISLAND AND PROVIDENCE PLANTATIONS

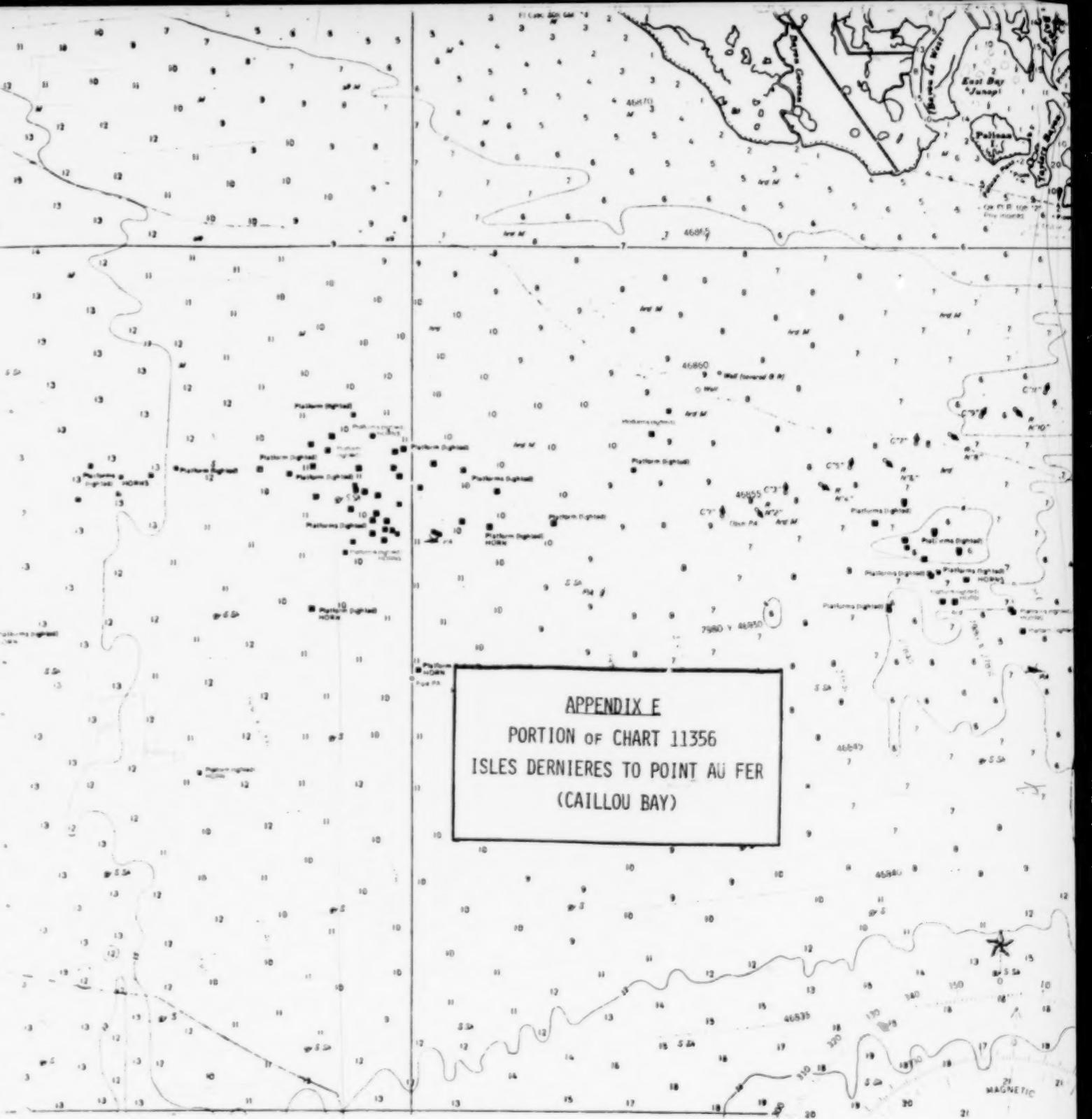
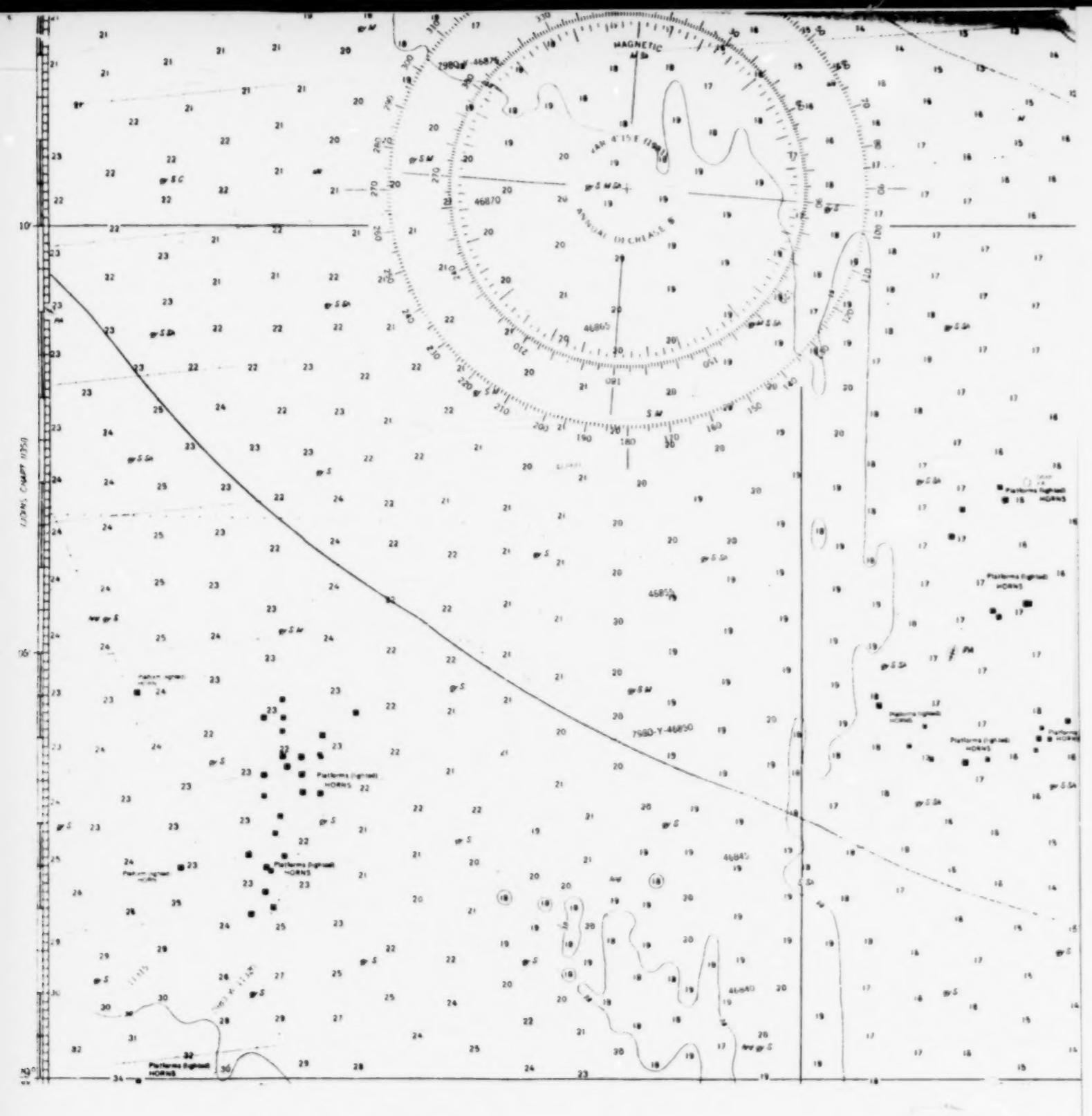
Daniel J. Ryan, Director
Department of Public Works

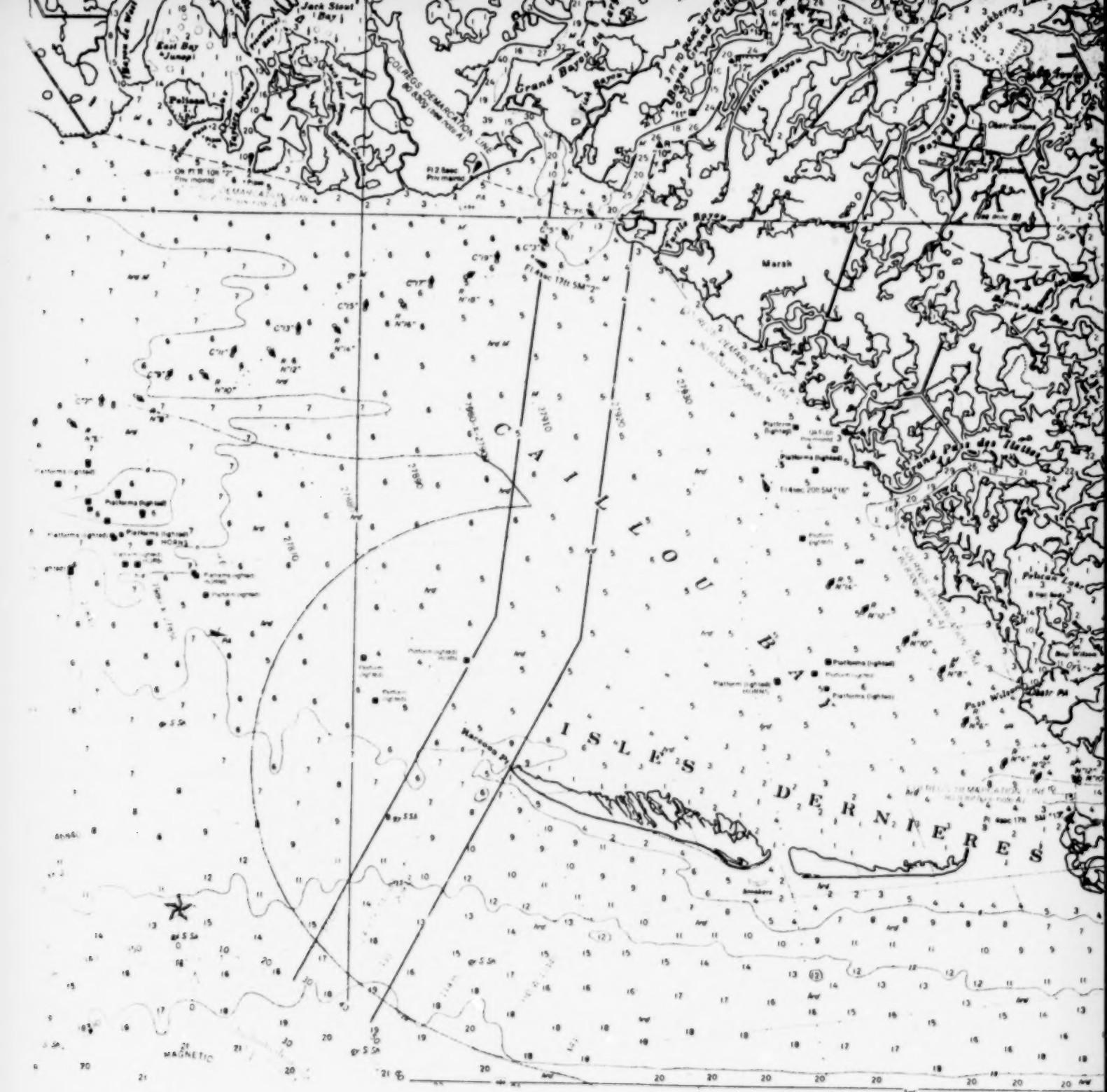
Edward H. Rathbun George L. Crooker
Chairman Chairman
Boundary Line Adjustment Commission Commission on Interstate Cooperation

J.A. Gathins, del.

35'

71° 30'





No. 35, Original

MAY 7 1984

ALEXANDER L STEVENS
~~States~~ CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(RHODE ISLAND AND NEW YORK)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES
AND SUPPORTING BRIEF

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

MARGARET N. STRAND
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(RHODE ISLAND AND NEW YORK)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States excepts to the Report of the Special Master insofar as it recommends that Long Island be treated as a part of the mainland and, accordingly, that all waters north of that island be found to constitute a juridical bay closed by a line between Montauk Point on Long Island and Watch Hill Point on the Rhode Island coast. Instead, the United States urges the Court to fix the seaward limit of inland waters in this area (the baseline for measuring the three-mile grant to the States under the Submerged Lands Act) at the series of lines (from Orient Point on Long Island, to Plum Island, to Fishers Island, to Napatree Point, Rhode Island) that define the historic waters of Long Island Sound.

Respectfully submitted.

REX E. LEE
Solicitor General

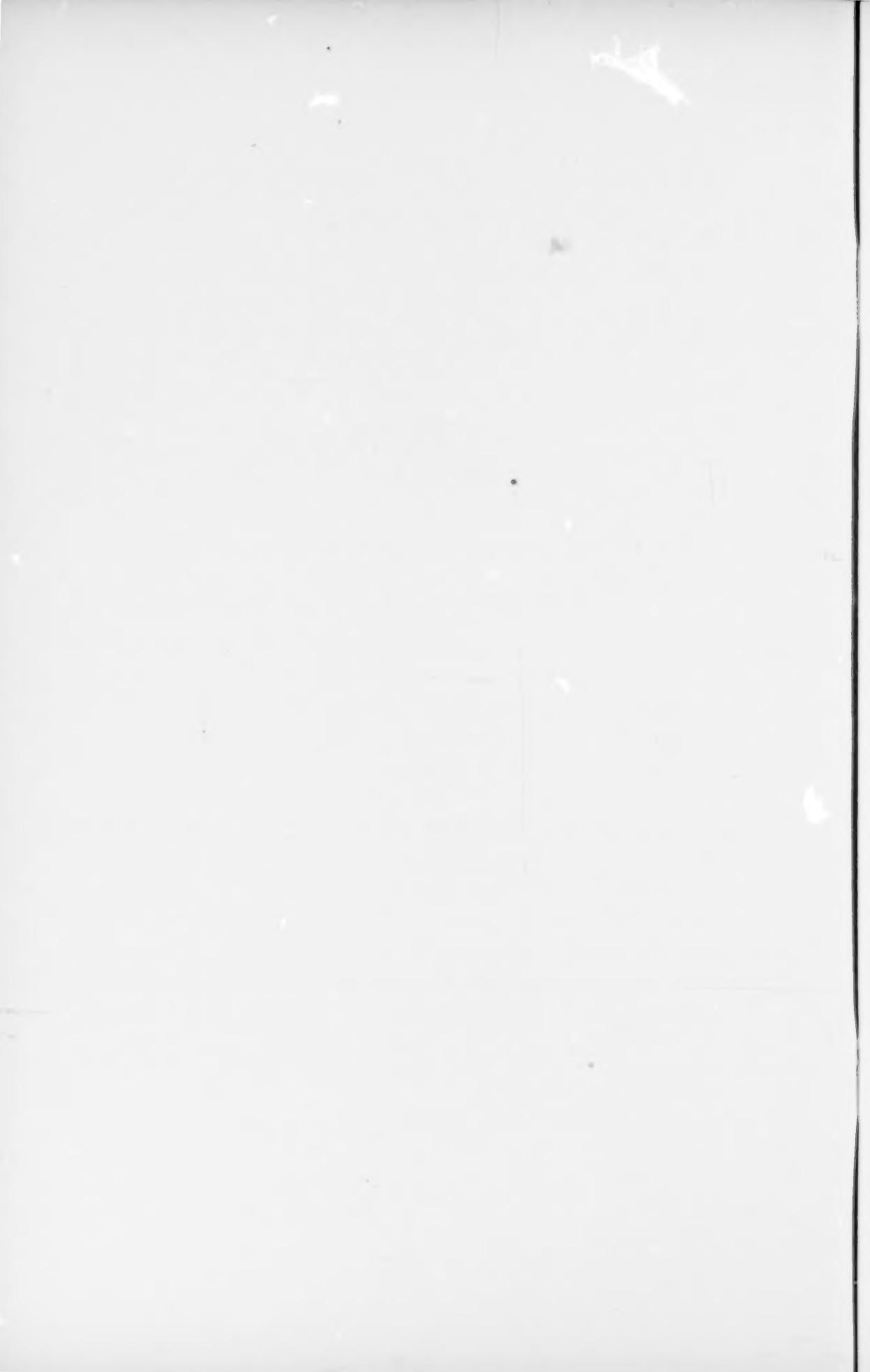


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TABLE OF AUTHORITIES

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<i>United States v. Maine (Decree)</i> , 423 U.S. 1	1, 2
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<i>Warner v. Dunlap</i> , 532 F.2d 767, petition for cert. pending, No. 75-6990	2

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Submerged Lands Act of 1953, 43 U.S.C. 1301 <i>et seq.</i>	2
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 Miscellaneous:	
D. Bowett, <i>The Legal Regime of Islands in International Law</i> (1979)	18
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1 R. Leckie, <i>The Wars of America</i> (1968)	23
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1 S. Morison & H. Commager, <i>The Growth of the American Republic</i> (1962)	22
Morris, "A Century Old, the Wonderful Brooklyn Bridge," 163 Nat'l Geographic 565 (May 1983)..	23
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<i>The Spirit of Seventy-Six</i> (H. Commager & R. Morris eds. 1967)	22, 23

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ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT
OF ITS EXCEPTION

STATEMENT

This is one of at least two sequels to the Court's decision in *United States v. Maine*, 420 U.S. 515 (1975).¹ It was there held that the several States

¹ A similar proceeding involving the coastline of Massachusetts is presently pending before the same Special Master. That matter will be submitted to him on final briefs and oral argument next month. The "seaward boundaries" of the remaining nine States, parties to No. 35, Original, have not been fixed. Nor have any proceedings to that end been initiated. But this Court has expressly reserved to those States the right to begin like litigation (423 U.S. 1, 2 (1975)), and they are presumably waiting in the wings, ready to proceed if the outcome of this case encourages that course.

bordering on the Atlantic Ocean, like those abutting the Pacific, held interests in the seabed off their coasts only to the extent granted by the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, viz., to a distance of three geographical miles from their respective "coastlines." See 423 U.S. 1 (1975). The Court, however, did not fix the coastline of any of the affected States—which, at some places, is the seaward limit of inland waters, rather than the low-water line of the shore²—and jurisdiction was retained to entertain further proceedings for that purpose. *Id.* at 2. A dispute having arisen over the status of Block Island Sound as Rhode Island waters (see *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976), petition for cert. pending, No. 75-6990), the United States initiated these proceedings in December, 1976, and in due course the Court appointed a Special Master. 433 U.S. 917 (1977). Although Rhode Island was initially the only respondent, New York later participated as well. Report 2-3.

The only issue in these proceedings is the status of all or part of Block Island Sound as inland waters of Rhode Island and New York. That Sound comprises an area that stretches from Gardiners Island, Plum Island and Fishers Island on the west to a line be-

² The three-mile belt of submerged lands granted to the States by the Submerged Lands Act is measured from the "coast line," *i.e.*, "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c). The same principle applies under the International Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, 1608-1609, Arts. 3, 5, and 7(4) (Report 5-6, 20-21), except that the coastline is there termed the "baseline," inland waters are referred to as "internal waters," and the 3-mile belt is called the "territorial sea."

tween Point Judith and Block Island on the east, and, at the south, a line between the eastern tip of Long Island and Block Island. See Report App. C; Chart 1, *infra*.³ The inland character of the waters to the west and north is undisputed. The United States has long claimed as historic inland waters the whole of Long Island Sound proper—closed at the east by lines from Orient Point on Long Island to Plum Island, to Fishers Island, and to Napatree Point, Rhode Island—and this assertion inures to the benefit of New York. Report 7. So, also, the United States treats Gardiners Bay as a juridical bay, closed by a line from Orient Point to Culloden Point that embraces Gardiners Island inside the bay. See Report App. C; Chart 1, *infra*. On the other hand, we deny that any part of Block Island Sound is inland. *Per contra*, Rhode Island and New York claim inland status for the whole of the Sound, whether as a “juridical bay” or as “historic waters.” Report 7-8; Chart 2, *infra*.

The Special Master has recommended a middle solution under which the western portion of Block Island Sound—to a line between Montauk Point on Long Island and Watch Hill on the Rhode Island mainland—would form part of a juridical bay that also encompasses the whole of Long Island Sound, but rejecting the inland water claim for the balance of Block Island Sound. See Chart 3, *infra*; Report 60-61. The Master first found that no historic inland water title for any part of Block Island Sound had been established. Report 8-19. Following the Court’s

³ As an aid to the Court, we have appended three charts to this brief to illustrate the positions of the parties and the Special Master’s recommended resolution. These simplified charts are traced from the eastern portion of Report App. B.

teaching, the Master then turned to applying the rules of the international Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, to determine if the Sound (or some portion of it) constituted a juridical bay, the closing line of which would be the "coastline" from which the three-mile submerged lands grant to the States is measured. Report 5-6, 20-21. It was quickly determined that no such bay satisfying the criteria of Article 7 of the Convention existed unless Long Island could be considered part of the mainland, but that if Long Island were so viewed, a juridical bay is present. Report 24-30, 47-49. Thus, in the Master's view (as in ours), the outcome turns entirely upon whether Long Island is or is not treated as an extension of the mainland mass—a peninsula—rather than a true island.

In addressing this critical question, the Special Master canvassed the precedents—primarily this Court's decision in the *Louisiana Boundary Case*, 394 U.S. 11 (1969), and the further proceedings in that case before a Special Master and the Court. Report 30-37. Turning to Long Island, the Master noted that the channel separating the formation from the mainland is a tidal strait, rather than a river, that it has a minimum depth of 35 feet, and that it is much utilized by commercial shipping carrying significant volumes of cargo. Report 39-43. But he concluded that the geographic facts were outweighed by evidence of geological, social and economic ties between the island and the mainland. Report 44-47. Specifically, the Master noticed the number of connecting bridges and tunnels (Report 45) and the "bay-like appearance" of the waters north of the

island, which, he observed, are "used as one would expect a bay to be used." Report 46.

Having concluded that Long Island should be deemed an extension of the mainland forming a juridical bay, the only remaining question was where to draw the closing line on the east. On this point, the Master rejected the States' proposal for a line that stretches from the tip of Long Island to Block Island and thence to Point Judith so as to enclose the whole of Block Island Sound (as well as Long Island Sound), and adopted the line conditionally proposed by the United States (on the assumption that Long Island is an extension of the mainland) from Montauk Point to Watch Hill.

We understand that Rhode Island and New York are filing Exceptions to other conclusions of the Report. But, for our part, we quarrel only with the Special Master's recommendation that Long Island be deemed a part of the mainland and the consequences that necessarily flow from that ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

The only issue presented by our Exception is whether Long Island ought to be deemed an extension of the mainland—treated as a peninsula rather than an island—for the purpose of fixing the "coastline" of the United States. The resolution of that question affects the boundary between federal and State submerged lands. If, as the Special Master concluded, the answer is "Yes," the consequence is that all of the water area between Long Island and the mainland coast to the north (including the whole of Long Island Sound and part of Block Island Sound) qualifies as a juridical bay, so that New York and Rhode Island own the bed and banks of these inland waters and,

additionally, are entitled to a 3-mile belt of submerged lands east of the line closing that bay (drawn between Montauk Point at the eastern tip of Long Island and Watch Hill Point on the Rhode Island coast). See Chart 3, *infra*. On the other hand, if, as we maintain, Long Island is considered an island, it cannot form a juridical bay, the States' inland waters are substantially less, and the baseline from which their submerged land grant should be measured is nearer shore. See Chart 1, *infra*.

But, more important than the acreage at stake in this case, are the principle involved and the precedent created. Besides the States of the Atlantic coast, presumably watching the outcome of this case (see note 1, *supra*), other affected States may well include Alaska, Hawaii, Washington and Oregon, as well as Mississippi and Alabama, where a similar question arises on the Report of the Special Master just filed with the Court (No. 9, Orig.). Nor are we only concerned about the domestic consequences. In light of the decision two decades ago to adopt the rules of the Convention on the Territorial Sea to resolve coastline questions under the Submerged Lands Act (*United States v. California*, 381 U.S. 139 (1965)), a ruling by this Court on the issue presented here constitutes an interpretation of that Convention with international implications.

A.

The Court has made clear that, in very special circumstances, formations that are technically islands or low-tide elevations should be assimilated as part of the mainland for the purposes of coastline delimitation. But, in practice, the Court has treated islands as mainland extensions only in the unique

situation of the Louisiana delta where the land is typically cut through by shallow waterways that create a jig-saw puzzle effect, or when an insular formation, separated from the mainland by a few feet of shallow water, merely extends the land a short distance in the same direction. And, equally important, the Court has rejected claims of island assimilation that, as a matter of geography, were much stronger than the case of Long Island. Unless some special factor justifies it, we cannot reconcile prior rulings with a holding that Long Island must be considered a part of the mainland rather than the island it appears to be. And, of course, the Equal Footing Doctrine prohibits disparate treatment of the States on this score.

B.

Current social and economic ties between Long Island and the mainland—much less a historic land connection—cannot overcome the geographical separation of the island. As the Court itself has noted, the controlling international Convention—with only rare and inapplicable exceptions—seeks to lay down clear and uniform rules for coastline determination that a navigator can apply by reference to his charts. That straightforward approach is defeated if the insular status of an island is to be made to depend on geological history or such variables as how many bridges connect it to the mainland and how many commuters pass over them. This Court's decree confirming the island character of the Florida Keys is a close precedent that should be followed here.

C.

Finally, we address the Special Master's emphasis on the "bay-like" appearance and usage of the waters sheltered by Long Island as especially relevant to the question whether the Island should be deemed a part of the mainland. This, it seems to us, is reasoning backwards—always a suspect enterprise. The Court has long settled that the inland status of waters shoreward of fringing islands that would not otherwise be deemed part of the mainland is governed solely by Article 4 of the Convention permitting the drawing of straight baselines, not by straining the rules for bays, and that a national decision to eschew straight baselines is binding on the States. Here, there is even less reason to bend the usual standard since the United States, recognizing the enclosed character of Long Island Sound, has long since claimed it as historic inland water, and that assertion inures to the benefit of the coastal States. Stretching the limits of the claim by misapplication of island assimilation principles is wholly unwarranted.

ARGUMENT**LONG ISLAND IS NOT AN EXTENSION OF THE
MAINLAND AND DOES NOT FORM A JURIDICAL
BAY**

The notion seems to have gone abroad that every island near shore is at least eligible for consideration as legally a part of the mainland if so treating it will affect the baseline from which the territorial sea (and the three-mile belt of submerged lands granted to the States) is measured. In consequence, expert evidence is now commonly submitted and elaborate arguments are advanced in support of the candidacy

of islands as mainland extensions that, twenty years ago, would not remotely have been thought qualified for such treatment. And, increasingly, Special Masters are engaged in a weighing of a growing catalog of "factors," many of them legally irrelevant, and all too often are persuaded to grant the plea for "assimilating" an island to the mainland mass. The time is overdue, we submit, for this Court to end a debate which has strayed well beyond proper bounds by reaffirming in clear terms that a geographical island is an island in the eye of the law except only in very rare and truly unusual circumstances.

A. Geographic Tests

1. In the jurisprudence of this Court, the seminal case on the point is *Louisiana v. Mississippi*, 202 U.S. 1 (1906). Invoking an Act of Admission that encompasses "all the islands within six leagues of the shore," Mississippi claimed the whole of the Louisiana Marshes at the eastern end of the St. Bernard peninsula, asserting that this area consisted of "islands" within the prescribed distance of the Mississippi coast to the north. See 202 U.S. at 20 (map), 45-46. In rejecting that claim, the Court ruled that, although "portions of [the] sea marsh [in suit] * * * might technically be called islands, because they are land entirely surrounded by water," these "hummocks of land" should not be deemed "true islands" but, rather, "integral part[s]" of the mainland "coast." *Id.* at 46.

This realistic result, almost compelled by the unique geography of southern Louisiana, was re-affirmed with respect to like portions of the same State in the *Louisiana Boundary Case*, 394 U.S. 11 (1969). As the Court there noted, "much of the Louisiana coast does not fit the usual mold. It is marshy, in-

substantial, riddled with canals and other waterways, and in places consists of numerous small clumps of land which are entirely surrounded by water and therefore technically islands." *Id.* at 63. To date, this special Louisiana situation—not remotely like the case of Long Island—is the only one in which the Court has actually approved treatment of a formation that is technically an island as an extension of the mainland. But the Court has written more generally on the point and, most significantly, has established practical guidance by rejecting a number of island-assimilation claims.

2. What the Court has *said*, all in the *Louisiana Boundary Case*, is clear enough so far as it goes. Thus, it is firmly settled that, while one or more islands in the mouth of a mainland indentation can help define a bay by shortening the water crossing portions of the closing line (the only parts that are counted in measuring the 24 mile maximum length and the diameter for applying the semi-circle test) (394 U.S. at 54-60), a fringe of islands may not form a bay in American territory—unless those islands realistically can be considered part of the mainland (*id.* at 62-63, 67).⁴ That is because the

⁴ The most relevant passages from the *Louisiana* opinion are the following (394 U.S. at 61-63, 67-68 (footnotes omitted)):

Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimi-

governing international Convention permits a coastal nation to claim the waters behind such an island fringe only by drawing straight baselines (*id.* at 67-71), but the United States has elected not to draw such lines and that decision is binding on the States (*id.* at 72-73). The critical question, then, is which islands should be considered extensions of the mainland, rather than true islands.

The Court has written that the "common-sense approach" followed in *Louisiana v. Mississippi* "extends to coastal formations where there are only a few islands, or even a single island, as well as to those where there are many" (394 U.S. at 64). On the other hand, the Court has disclaimed any suggestion that, "under the now controlling Convention on the Territorial Sea and the Contiguous Zone, every Mississippi River Delta mudlump or other insular formation is a part of the coast" (*id.* at 65 n.84). The only comprehensive statement of a rule has been the following (*id.* at 66 (footnote omitted)):

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the

tation of bays. But much of the Louisiana coast does not fit the usual mold. * * *

* * * * *

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines.

mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. * * * [T]he task [is one] of determining * * *—in the light of these and any other relevant criteria and any evidence [a Special Master] finds it helpful to consider—whether the islands which [the coastal state] has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the “coast” within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

On its face, this may appear a somewhat open-ended invitation to island-assimilation claims, especially when preceded by the listing of an additional “consideration” in “the origin of the islands and their resultant connection with the shore” (394 U.S. at 65 n.84), and followed by a caveat to the effect that the enumeration of relevant factors “is intended to be illustrative rather than exhaustive” (*id.* at 66 n.86). As we have noted, the temptation to stretch such a seemingly pliable standard has not been missed. But what has been largely ignored is the Court’s actual practice in applying its test. Only when we notice the many island assimilation questions that have been resolved in the negative, can we appreciate that the Court has in fact followed a very rigorous standard—which, of course, should govern all coastal States alike.

3. The first significant ruling is that involving the chain of the Isles Dernieres, claimed to form Caillou Bay off the Louisiana coast. See Report App. E. Although the nearest of those islands was less than one-third of a mile from the mainland, Louisiana did not

originally contend that it was "so closely aligned with the mainland as to be deemed a part of it" and the Court expressly agreed that none of the islands would qualify. 394 U.S. at 67 n.88; see also *id.* at 66 n.87. Nor did the matter rest there. Before the Special Master, Louisiana changed its stance, arguing for treating the Isles Dernieres as a peninsula, and the Master indicated that he would allow the claim but for the Court's prior ruling. Report of the Special Master of July 31, 1974, at 50-51. The State pressed the matter on Exceptions (Brief for the State of Louisiana filed November, 1974, at 146-150, App. I 285-308), but the Court again rejected the plea. 420 U.S. 529, 530 (1975).⁵

The Court likewise treated as true islands similar island fringes shielding the entrances of Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay. See 394 U.S. at 50 n.65, 52, 53 n.71, 58-59 n.79, 66-67, 67 n.88.⁶ Yet, in most of these cases, the

⁵ The Special Master in the present case adverts to the precedent of Caillou Bay. Report 31-32 and n.22, 36. He draws a wholly different lesson, however: that true islands not part of a deltaic formation are eligible for assimilation as part of the mainland. *Id.* at 32 n.22, 36. Even accepting that point, we believe the most obvious message to be derived from the Court's *rejection* of the Isles Dernieres as mainland extensions is that islands off the coast, separated by a distinct, although narrow, navigation channel, are *not* to be treated as part of the land mass.

⁶ Obviously enough, the question how to draw a bay closing line when "islands" are situated at the mouth of the indentation does not arise if the formations are properly deemed part of the mainland. So, also, extensions of the mainland cannot be treated as water for semicircle measurement purposes. See Article 7(3) of the Territorial Sea Convention, reproduced at Report 20. It follows that the Court considered the islands in these fringes as true islands.

formation nearest shore was separated from the mainland by a very shallow and narrow water area—in the last three instances, “channels” less than 300 feet wide and one foot deep.

The same ruling later eventuated in respect of some eight other claims by Louisiana that islands or low-tide elevations should be deemed part of the mainland, which the Court initially referred to its Special Master. See 394 U.S. at 60, 66.⁷ Among these were

⁷ In most instances, Louisiana asserted its claim before the Court in 1968, then before the Special Master, and again by way of Exceptions in the Court at the 1974 Term. The islands or low tide elevations in question were: a mudlump off North Pass, to form the southern headland of Isle Au Breton Bay (1968 La. Br. 172-175); three mudlumps off North Pass, to form the southeast headland of Bucket Bend Bay (1974 Report 36-37; 1974 La. Br. App. I 254-260; 1975 U.S. Reply Br. 45); a mudlump off Pass a Loutre, to form the north headland of Blind Bay (1968 La. Br. 179-180; 1968 U.S. Br. 119-120; 1974 Report 38-40; 1974 La. Br. App. I 260-264; 1975 U.S. Reply Br. 44-45); three mudlumps off Southeast Pass, to form the southern headland of Blind Bay (1968 La. Br. 180; 1968 U.S. Br. 119-120; 1974 Report 38-40; 1974 La. Br. App. I 264-271; 1975 U.S. Reply Br. 44-45); the same mudlumps, to form the eastern headland of Garden Island Bay/Redfish Bay (1968 La. Br. 181; 1968 U.S. Br. 116-118; 1974 Report 40-42; 1974 La. Br. App. I 264-271; 1975 U.S. Reply Br. 43-44); East Timbalier Island, to form the eastern headland of Timbalier Bay/Terrebonne Bay/Lake Pelto Complex (1968 La. Br. 288; 1968 U.S. Br. 91-97; Report 48-49); Whiskey Island, to form the western headland of the same Complex (1968 La. Br. 288; 1968 U.S. Br. 91-97; Report 48-49); low tide elevations west of Point au Fer, to form the eastern headland of Atchafalaya Bay (1968 La. Br. 305; 1968 U.S. Br. 66-70; Report 52-53; 1974 La. Br. 140; *id.* App. I 308-310; 1975 U.S. Reply Br. 42-43); the Shell Keys, to form the western headland of Atchafalaya Bay and the eastern headland of “Outer

a number of instances in which the water gap between mainland and insular formation was only a few hundred feet wide and one to four feet deep.⁸ And, significantly, several of the islands claimed as part of the mainland were so-called "mudlumps," islets formed of soil that had only recently become detached from the mainland mass. See note 7, *supra*, and Point B, *infra*.

4. The upshot of the *Louisiana Boundary Case* was that no claim of island assimilation was approved by the Court—except only the few very obvious cases accepted *sua sponte* by the United States. These were almost exclusively situations (like that of the Louisiana Marshes at issue in *Louisiana v. Mississippi*) in which the land was so riddled with shallow waterways that no "mainland" would be encountered for several dozen miles inland if every technical island were so treated. See 394 U.S. at 63. The only other instances were where the island formation was separated from the mainland by less than fifty feet of wading depth water and the consequence of assimilating the island was merely to extend an existing head-

"Vermillion Bay" (1968 La. Br. 305; 1968 U.S. Br. 57-70; 1974 Report 52-53; 1974 La. Br. App. I 217, 310-311; 1975 U.S. Reply Br. 41-42.

⁸ E.g., the nearest of the mudlumps off North Pass suggested by Louisiana as a headland for Bucket Bend Bay was less than 600 feet from the mainland and the intervening waters are no more than one foot deep (see 1974 La. Br. App. I 254-260); and the nearest mudlump claimed as the southern headland of Blind Bay was separated from the mainland by a shallow channel four feet deep at most and some 1600 feet wide (1974 La. Br. App. I 264-271).

land a relatively small distance seaward.⁹ Long Island does not remotely fit that mold.

Long Island, it must be stressed, is some 100 miles long, with a shoreline of more than 450 miles, all but a dozen miles of which are obviously "isolated" by very substantial waters from the mainland. See Report App. B. It is in no sense "nestled" in the land mass, like an interlocking piece in a jigsaw puzzle. Even at its western end, Long Island is separated by a tidal strait—mislabelled the East "River." Where the Island is closest to the mainland proper (at Throg's Neck), that channel is more than two-thirds of a mile wide; it has a minimum depth of 35 feet; and it supports a great volume of commercial navigation. See Report 39-43, 68. Moreover, to treat Long Island as part of the mainland would not merely extend it a little, but would grossly distort the coastline.

Unless some special factor takes Long Island out of the pattern, it is not possible to reconcile the result in Louisiana—most notably, the rejection of the Isles Dernieres as forming Caillou Bay—with a holding that Long Island is a part of the mainland and thus may create a bay. Indeed, in the *Louisiana Boundary Case* itself the Court expressly adverted to Long Island as a true "insular formation" that could not properly form a juridical bay. 394 U.S. at 72 n.95. Here, as elsewhere, the Equal Footing Doctrine forbids treating some states more generously than others. See *United States v. Texas*, 339 U.S. 707, 717-718 (1950); *United States v. Maine*, 420 U.S.

⁹ See, e.g., the islet at the tip of the northern headland of Redfish Bay, separated from the mainland by a water gap less than one foot deep and 30 feet wide, pictured at 1968 U.S. Br. 117.

515, 523, 527-528 (1975). See also, *Louisiana Boundary Case*, 394 U.S. at 33-35.

B. Socio-economic Ties

Apparently recognizing that Long Island would not qualify as an extension of the mainland if only geographical tests were applied, the States and the Special Master stressed a prehistoric geological connection and present social and economic ties between the island and the continental land mass. Report 44-47. That is, we submit, an impermissible approach, at odds with the method adopted by the Convention and approved by this Court.

The irrelevance of a "land bridge" connecting Long Island and the mainland some 25,000 years ago needs little comment. As we have noted (pages 12, 15, *supra*), notwithstanding the statement that the "origin" of islands is "one consideration," the Court in the *Louisiana Boundary Case* in fact rejected every claim advanced by the States that "mudlumps" quite recently emerged out of inland soil should be assimilated to the mainland. Obviously enough, a prehistoric connection is of even more doubtful relevance in determining whether an island ought to be treated as part of the land mass today. After all, it is probably a fact that at some distant time, before the glaciers melted, water did not "isolate" most of our present offshore islands—no doubt including the Florida Keys. See page 19, *infra*.

The argument is no better for taking into account current social and economic ties between an island and the mainland. Quite naturally, the question has arisen from time to time whether islands ought to be treated differently depending upon whether they were habitable, or actually populated, or otherwise associ-

ated with the mainland. But it is perfectly clear that those who drafted the Geneva Convention on the Territorial Sea quite deliberately put aside such distinctions. See D. Bowett, *The Legal Regime of Islands in International Law* 7-9 (1979). Clarity, simplicity, and uniformity were obviously served by disregarding variable and debatable data of this kind. Cf. *United States v. California*, 381 U.S. 139, 165, 167, 177 (1965); *Louisiana Boundary Case*, 394 U.S. at 34. And, perhaps most important, there was a special virtue in limiting the factors that define the coastline to those that appear on typical nautical charts. A foreign navigator ought to be able to gauge from the chart alone which formations are islands and which waters are inland—except only where there is a notorious claim to historic waters.¹⁰

This Court has been entirely consistent on this score—rebuffing both the United States and the affected State when either sought to introduce non-geographic ingredients to coastline delimitations. On the one hand, efforts to distinguish between land extensions that result directly or indirectly from artificial causes have been rejected. *United States v. California*, 381 U.S. at 177; *Louisiana Boundary Case*, 394 U.S. at 41 n.48. See, also, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982). As the Court put it most emphatically in the *Louisiana Boundary Case*, *supra*: “[W]e

¹⁰ Under Article 3 of the Territorial Sea Convention, “the normal baseline for measuring the breadth of the territorial sea is the low-water along the coast as marked on large-scale charts officially recognized by the coastal state.” Exceptions are provided for by Article 4 (straight baselines) and Article 7 (bays). Straight baselines are required to be marked on charts (Article 4(6)), but the closing lines of bays are not.

[cannot] accept the United States' argument that a 'mere spoil bank' should not be deemed part of the coast because it is not 'purposeful or useful' and is likely to be 'short-lived.' It suffices to say that the Convention contains no such criteria." 394 U.S. at 41 n.48.

Of course, the converse is equally true: a geographical feature does not gain additional or different status because it is of unusual social and economic importance, or because it is "demographically" tied to the mainland. Thus, an island does not cease to be an island because its "isolation" is tempered by a bridge that creates an easy and much travelled connection to the mainland. The case of the Florida Keys amply proves the point. Despite the connecting highway, the ultimate ruling there was that the Keys must be treated as true islands, separate from each other and separate from the mainland, with the consequence that the area claimed as "Florida Bay" could not qualify as a bay. See *United States v. Florida*, 420 U.S. 531, 533 (1975); 425 U.S. 791, 793 (1976).¹¹ There is no better ground for breaking the usual rules in the case of Long Island on account of its ties to the mainland.¹²

¹¹ See, also, *United States v. California*, 447 U.S. 1 (1980), in which the Court rejected the State's claim that its coastline was extended by a number of open-work piers and an artificial island connected to land by such a pier. In the latter case, the artificial island would have qualified if the bridge to the mainland had been viewed as equivalent to a landfill connection. See *Louisiana Boundary Case*, 394 U.S. at 41 n.48, discussing the spoil bank at Pass Tante Phine.

¹² The Special Master leaves the impression that in the *Louisiana* case the United States argued that the Florida Keys should be considered a part of the mainland. Report 39 n.29. To be sure, as this Court observed in the cited footnote, we then distinguished the case of the Florida Keys because of the

C. Bay-like Appearances

Unsurprisingly, the Special Master did not rest his finding that Long Island was juridically a part of the mainland on geographical tests or on socio-economic ties and bridge connections. Instead, he was critically influenced by the "bay-like appearance" and usage of the waters sheltered by Long Island and apparently believed a little straining was justified to vindicate the existence of such a juridical bay, possible only if Long Island were treated as an extension of the mainland. In the Master's own words, "[t]wo factors [were] of utmost importance [in reaching the] conclusion [that Long Island can be treated as part of the mainland]" (Report 46-47 (footnote omitted)):

Long Island's geographic alignment with the coast is the first. Long Island and the coast are situated and shaped such that they enclose a large pocket of water, which closely resembles a bay. By viewing charts of the area, the bay-like appearance of the area is obvious and it becomes readily apparent that the enclosed water has many of the characteristics of a bay. Second, the geographic configuration of Long Island and the mainland forces the enclosed water to be used as one would expect a bay to be used. Ships do not pass through Long Island Sound and the East River unless they are headed for New York Harbor or ports on Long Island Sound. Ships bound

connecting highway. But, even in 1968, we were careful to add that "in pointing out this distinction we do not necessarily agree that even that circumstance justifies [Dr. Pearcy's] use of the keys [as forming the side of a bay]." 1968 U.S. Reply Br. 33. At all events, it is perfectly clear that when the issue of the Keys and Florida Bay reached the Court, the United States insisted that the Keys should be treated as true islands and not as part of the mainland.

for ports not in the enclosed area navigate outside of Long Island and Block Island as they pass up and down the United States coast. Long Island Sound is not a route of international passage; ships merely pass into and out of it as one would expect ships to pass into and out of a bay.

Long Island Sound, without question, would be a juridical bay if the East River did not separate Long Island and the mainland.

This is a wholly impermissible approach. Whether an island—contrary to normal rules—should be assimilated to the mainland cannot turn on, or be influenced by, the effect accepting such a fiction will have on creating a juridical bay. Nothing in this Court's precedents remotely condones such a result-oriented technique of decision. Indeed, the Court's ruling with respect to the area claimed as "Caillou Bay" in the *Louisiana Boundary Case* impliedly rejects the method followed here. Nor does the Convention on the Territorial Sea permit this kind of stretching to fashion a bay. On the contrary, Article 4 of the Convention offers every coastal nation a straightforward way of claiming as inland waters sheltered by islands quite independently of juridical bay criteria. See *Louisiana Boundary Case*, 394 U.S. at 66-71. The fact that the United States has chosen not to adopt such a straight-baseline system is no reason for bending the rules governing bays by treating an island as a peninsula. *Id.* at 72-73.

In no event is it proper to deny the insular character of a true island simply to legitimize a "bay-like" water body. But, in this instance, the irony is that even this pretext is absent. Indeed, the United States has long claimed most of the waters behind Long Island—Long Island Sound strictly speaking—

as historic inland waters. This claim, of course, inures to the benefit of the coastal States. And it explains why the area in question is, as the Special Master found (Report 46), "used as one would expect [an inland] bay to be used." But, of course, the existence of an historic bay encompassing most of the waters in question is no justification for expanding that bay by fictitiously treating an island as an extension of the mainland.

Although history is irrelevant, one is tempted to wonder how, in August 1776, General Washington would have answered the question whether Long Island is a true island after he had crossed the East River and temporarily escaped from a superior British force, winning a respite that may have saved the Revolution. See 1 S. Morison & H. Commager, *The Growth of the American Republic* 206 (1962). We may perhaps let others present speak for him. Before the successful evacuation, John Adams worried about putting such a large part of the new nation's forces on Long Island, "from which retreat was virtually impossible." 1 P. Smith, *John Adams* 299 (1963). Washington's own subordinates described the plight of the Americans as being encircled "from water to water" by an overwhelming enemy with almost "perfect command of the island," and being confronted with the "most formidable obstacles" to evacuating "a body of troops, with all their necessary appendages, across a river a full mile wide, with a rapid current." *The Spirit of Seventy-Six* 444 (Brig. Gen. Scott), 445 (Col. Tallmadge) (H. Commager & R. Morris eds. 1967). When the operation nevertheless succeeded, a British commander was indignant,

picturing "twenty-two thousand men, stand[ing] on the banks of the East River, like Moses on Mount Pisgah, looking at their promised land, little more than half a mile distant, [where] [t]he rebel's standards waved insolently in the air." *Id.* at 448 (Comdr. Collier).¹⁸

No different reply would have been likely from those who, a century later, accomplished the notable feat of connecting Long Island to Manhattan by "spanning the fierce tides of the East River" with the Brooklyn Bridge, then "the longest suspension bridge on earth." See Morris, "*A Century Old, the Wonderful Brooklyn Bridge,*" 163 Nat'l Geographic 565 (May 1983). The elapse of another hundred years and the building of several more bridges have not changed the common perception that Long Island is indeed an island. In this, at least, the law can safely accept what laymen have always known.

¹⁸ In his *Oxford History of the American People* 240 (1965), Admiral Morison has likened Washington's "skillful retirement" from Long Island to that of the British from Dunkerque in 1940, where another water channel "saved an army from annihilation and allowed the war to continue." Other accounts of the Battle of Long Island, illustrated by sketch maps, may be found in 1 R. Leckie, *The Wars of America* 142-146 (1968); and *Encyclopedia of American History* 108-109 (Morris ed. 1976).

CONCLUSION

The Report of the Special Master should be disapproved insofar as it recommends that Long Island be treated as a part of the mainland and, accordingly, that all the waters north of that island be found to constitute a juridical bay closed by a line between Montauk Point on Long Island and Watch Hill Point on the Rhode Island coast. Instead, the United States urges the Court to fix the seaward limit of inland waters in this area (the baseline for measuring the three-mile grant to the States under the Submerged Lands Act) at the series of lines (from Orient Point on Long Island, to Plum Island, to Fishers Island, to Napatree Point, Rhode Island) that define the historic waters of Long Island Sound. In all other respects, the recommendations of the Special Master should be approved.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

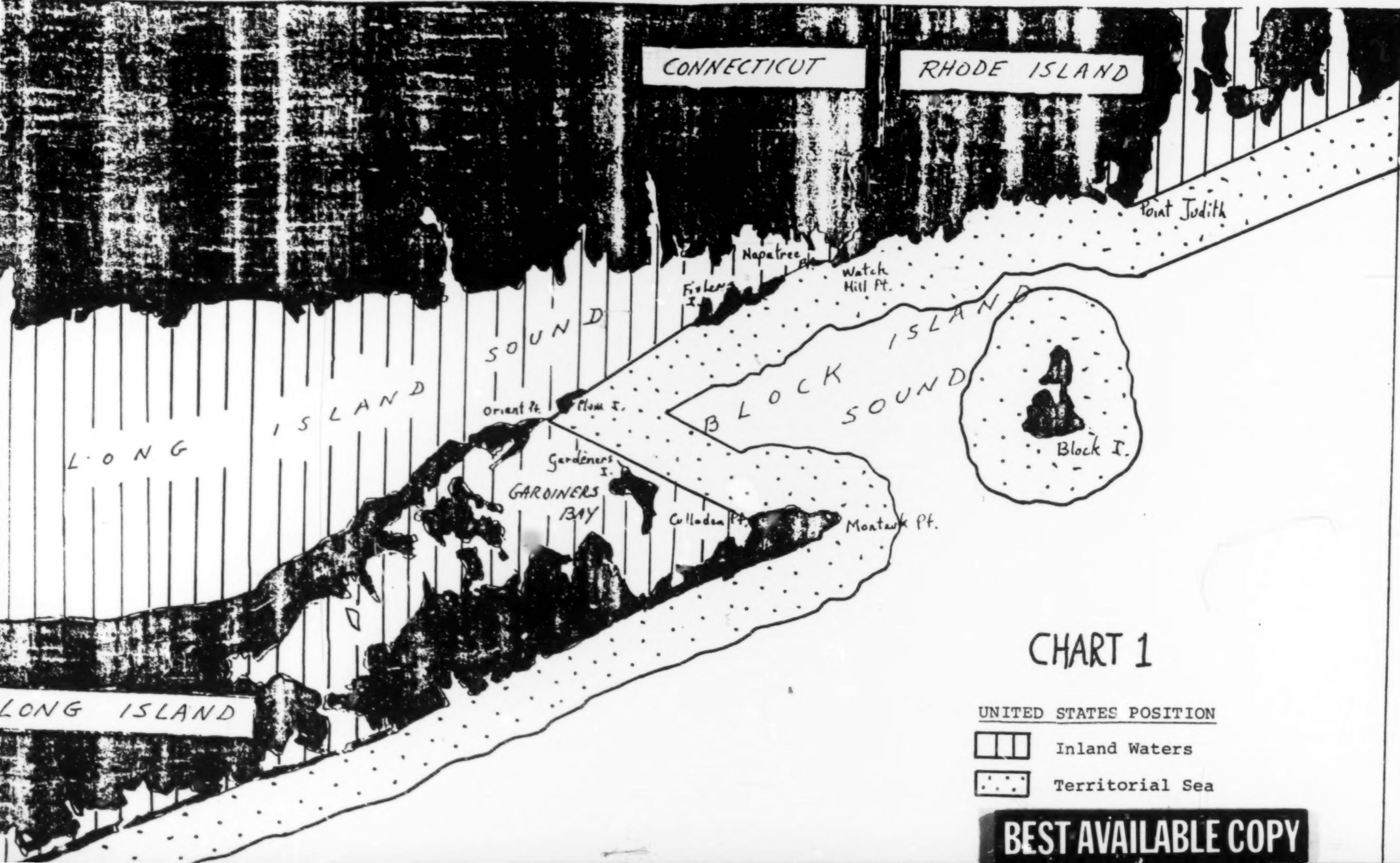
LOUIS F. CLAIBORNE

Deputy Solicitor General

MARGARET N. STRAND

Attorney

MAY 1984



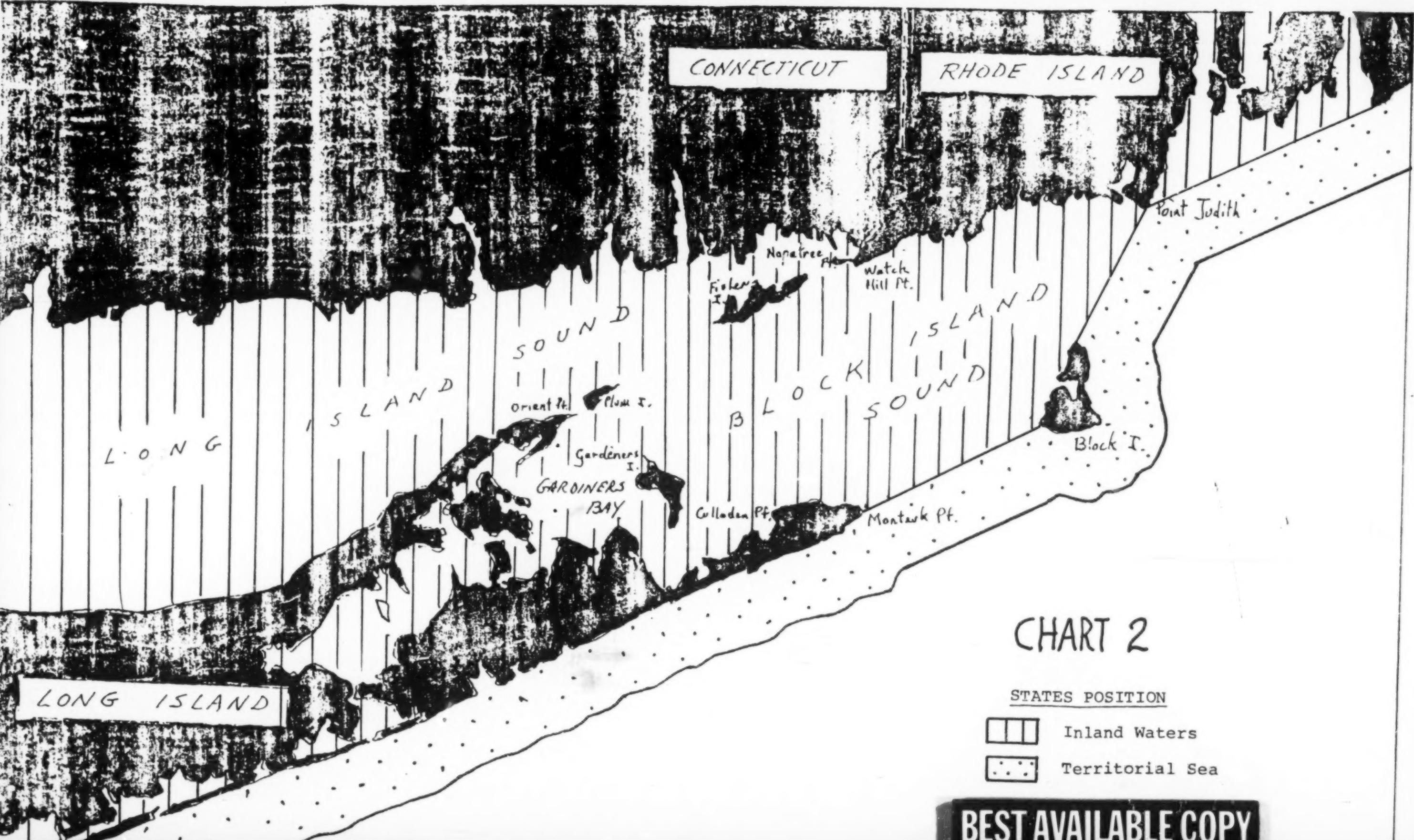


CHART 2

STATES POSITION

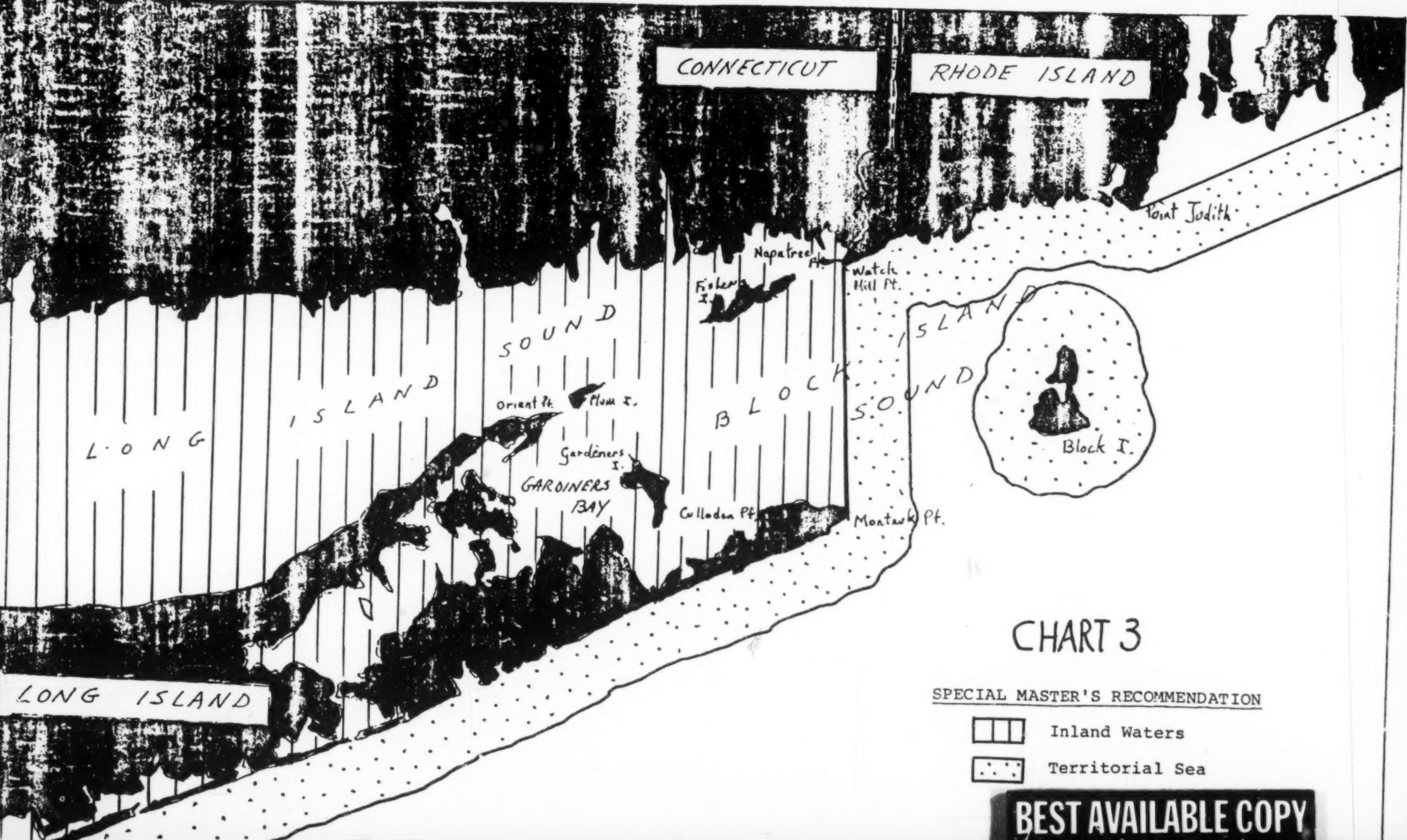


Inland Waters



Territorial Sea

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No. 35, Original.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
(RHODE ISLAND, NEW YORK),
DEFENDANTS.

Exceptions and Brief of the State of Rhode Island.

DENNIS J. ROBERTS II,
Attorney General,
State of Rhode Island,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

J. PETER DOHERTY,
Special Assistant Attorney General,
RFD Hawkseye Farm,
Sharon Springs, New York 13459.
(518) 284-2147

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No. 35, Original.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
(RHODE ISLAND, NEW YORK),
DEFENDANTS.

Exceptions and Brief of the State of Rhode Island.

Introduction.

This brief is submitted on behalf of the State of Rhode Island. As the introduction to the January 13, 1984, Report of the Special Master details, the issue before the Court is the location of the legal coastline of the United States, the State of Rhode Island and the State of New York at the eastern end of Long Island Sound and Block Island Sound. The Court's resolution of this issue turns on whether or not Long Island Sound and Block Island Sound form a bay under the terms of the Convention on the Territorial Sea and the Contiguous Zone, and if a bay is formed, the proper closing lines of that bay.

As Rhode Island's exceptions to the Master's Report demonstrate, the area of disagreement with the Report is narrow, but critical. Rhode Island agrees that an historic claim to the waters of Block Island Sound was not established. Further, the Master's conclusions that Long Island can be treated as part of the mainland under Article 7 of the Convention and that Long Island Sound and Block Island Sound form a well-marked indentation satisfying the semi-circle test of Article 7 are in accord with Rhode Island's view of this proceeding. It is to the way in which the Master proposes to close the bay that Rhode Island takes exception.

This brief is directed only to Rhode Island's view of the correct method to close the juridical bay formed by Long Island and Block Island Sounds.

Exceptions.

The State of Rhode Island excepts to the following findings and conclusions in the Master's Report:

1. Watch Hill Point is the first prominent point when heading west along the otherwise featureless Rhode Island coast (Report, p. 53).
2. The Special Master attaches no weight to the test White developed for determining when a body of water is landlocked, or White's conclusions (Report, p. 56, n.42).
3. The closing line for the bay is a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island (Report, pp. 59, 60, 61).
4. Watch Hill Point is the first prominent point on the Rhode Island coast and it also marks the separation between the watersw within the indentation and the waters outside the indentation (Report, p. 59).

5. Watch Hill Point is the logical natural entrance point on the north side of the indentation (Report, p. 59).
6. The waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while waters east of this line are not landlocked (Report, p. 59).
7. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea (Report, p. 59).
8. There is no perception that these waters are part of the land rather than open sea (Report, p. 59).
9. The Point Judith harborworks and Point Judith are not appropriate headlands of a bay because they do not mark the entrance to the indentation but are located outside the indentation (Report, p. 59, n.45).
10. A closing line drawn to Point Judith or the Point Judith harborworks would enclose waters that are not landlocked (Report, p. 59, n.45).
11. Block Island cannot be included in the closing line (Report, p. 60).
12. If the closing line included Block Island, there would be waters inside the closing line which are not landlocked (Report, p. 60).
13. The natural entrance or mouth to the indentation is along the Montauk Point to Watch Hill Point line, and Block Island does not form the mouth to the bay or cause the bay to have multiple mouths.
14. Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island.
15. The legal coastline (or baseline) in the disputed area is the ordinary low water line from Point Judith along the mainland to Watch Hill Point, then a straight closing line south to Montauk Point on Long Island. The legal coastline of Block

Island is the ordinary low water line around Block Island. The territorial waters of the United States are measured from this baseline (Report, p. 61).

Standard for Decision.

As an original jurisdiction proceeding under Article III, this Court is the sole tribunal to which the United States, Rhode Island and New York may come for resolution of the issues presented. The Special Master, as is the practice, has filed his report containing findings, conclusions and recommendations with the Court. The question remains as to what weight, if any, the Master's Report should be accorded by the Court.

Rhode Island submits that the ultimate decision on the *facts* as well as the law must rest with the Court. The "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure has no place in an original proceeding for reasons beyond the fact that the Federal Rules of Civil Procedure only apply to district courts. Rule 1. Original actions are delicate matters which the Constitution sought to resolve at the highest level. Such a resolution gives finality and acceptability to the result. Further, where the Master's Report is based upon a review of the documents, including charts, and the testimony of expert witnesses or uncontradicted lay witnesses, the Court may find facts on a cold record without the difficult problem of weighing credibility.

Indeed, in *Mississippi v. Arkansas*, 415 U.S. 289 (1974), the Court, in reviewing the Master's Report in a boundary dispute proceeding, approved the Report only after noting its "complete agreement and accord" with the Master's evaluation of the evidence. *Id.* at 291. Further, the Court noted that its decision was "upon our own consideration and our independent

review of the entire record." *Id.* at 296. The dissent outlined a similar standard as well as the history of the standard for decision in original cases. *Id.* at 296-97, 296 n.1 (Douglas, J., dissenting).

In *Mississippi v. Arkansas, supra*, had a majority of the Court merely disagreed with the Master's evaluation of the maps and other documents or the Master's appraisal or understanding of the expert testimony, reversal would have been the only appropriate remedy. Thus, while the findings of the Special Master are of course entitled to respect they have not heretofore been entitled to deference. *Id.* at 297.

The instant Report provides further cause for the Court to examine the record and independently evaluate the evidence. In that portion of the Report which discusses the appropriate bay closing line, the Master makes conclusory statements without identifying the relevant underlying facts supporting the conclusion. For example, the Master summarily rejects Rhode Island's objective test to determine whether or not a body of water is landlocked (Report, p. 56, n.42). Additionally, the Master summarily rejects Point Judith as an appropriate headland (Report, p. 59, n.45). Such findings would be clearly useless were these appellate proceedings. E.g., *Dalehite v. United States*, 346 U.S. 15 (1953). Indeed, the statement of underlying reasons by a decisionmaker is among the essentials of due process and fair treatment. *Kent v. United States*, 383 U.S. 541 (1966). In this original proceeding, the unsupported conclusions in the Report should give the Court cause to determine how the juridical bay formed by Block Island Sound and Long Island Sound should be closed under the applicable law and the evidentiary record.

Argument.

I. UNDER THE MOST CONSERVATIVE READING OF ARTICLE 7, THE MONTAUK POINT TO WATCH HILL POINT CLOSING LINE IS INCORRECT.

The complete text of Article 7 of the Convention is set forth in Appendix A. That Article together with its history and the Court's decision in *United States v. Louisiana*, 394 U.S. 11 (1969) provide the framework by which bay closing lines may be divined.¹

The closing line of a bay is drawn between the "natural entrance points" of the indentation. The parties agree that Montauk Point is one of the natural entrance points to the bay formed by Long Island Sound and Block Island Sound. Leaving aside the issue of whether a closing line may be drawn to Block Island, Watch Hill Point cannot be selected as the other natural entrance point.

The term "natural entrance point" is left undefined by the Convention. The Master's Report accurately sets out the manner in which commentators and geographers have sought to define the term, both subjectively and objectively (Report, p. 50, n.39).

¹Under the terms of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, the United States relinquished to the coastal States all of its rights in submerged lands extending three nautical miles seaward from the State's coastline. The Act was passed in response to the Court's decisions in *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707 (1950); and *United States v. Louisiana*, 339 U.S. 699 (1950) holding that the States did not own the submerged lands off their coasts. The term "coastline" was defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301 (c). The Court's 1965 decision in *United States v. California*, 381 U.S. 139 (1965), held that Congress had left the task of defining "inland waters" to the Court. The Court adopted the provisions of the Convention.

By using the forty-five degree test together with the Article 7(5) notion that, given several entrance points which meet the subjective or objective tests, a closing line should be drawn to enclose the maximum area of water,² a point in the vicinity of Quonochontaug Pond, Rhode Island, *east* of Watch Hill Point, would be the appropriate headland. That point satisfies the forty-five degree test, and the line is less than twenty-four miles in length. (Testimony of White on cross-examination by the United States, November 13, 1981, pp. C 51-52; R.I. Ex. 1(c)). Indeed, Watch Hill Point and Napatree Point also satisfy the same criteria. Their infirmity lies in their location — to the west of Quonochontaug. Napatree Point marks the beginning of the scalloped Rhode Island coastline which proceeds east to its most prominent promontory, Point Judith. At best, the selection of Watch Hill Point as an entrance point by the Master was a compromise.

II. LONG ISLAND SOUND AND BLOCK ISLAND SOUND ARE PROPERLY CLOSED BY A LINE BETWEEN MONTAUK POINT AND LEWIS POINT ON BLOCK ISLAND AND A LINE BETWEEN SANDY POINT ON BLOCK ISLAND AND POINT JUDITH.

Block Island lies at the opening of the long and deep indentation formed by Long Island Sound and Block Island Sound. Block Island lies seaward of a line between Montauk Point and Point Judith yet it influences Block Island Sound in a number of significant ways. First, coastal traffic coming from Montauk Point en route to Narragansett Bay or Buzzards Bay and the Cape Cod Canal routinely pass *outside* of Block Island.

² Commentators have suggested that the policy of Article 7(3) supports a policy of enclosing the maximum area of inland waters in closing bays. Shalowitz, *Shore and Sea Boundaries*, 218-225 (1962); Pearcy, *Measurement of U.S. Territorial Sea*, 40 Dept. State Bull. 963, 966 fig. 4 (1959); cited with apparent approval, 394 U.S. at 57 n.78.

The reverse is also true. (Testimony of Neary, November 13, 1981, pp. C 88-92). Second, commercial vessels rarely pass between Montauk Point and Block Island. The breaking swell, rocks and other obstructions render the area hazardous. (Neary, November 13, 1981, pp. C 92-95). Third, Block Island, alone, and together with Montauk Point and Point Judith provides shelter in rough weather and cuts down on the swell. (Neary, testimony of November 13, 1981, pp. C 108-109, 118-122); *Warner v. Replinger*, 397 F.Supp. 350 (D.R.I. 1975). Fourth, the salinity of the water in Block Island Sound is less than that of sea water and is influenced by runoff on the mainland. (Swanson, November 11, 1981, pp. 3-107-108, 3-116-118). Fifth, Block Island has an effect upon the velocity and timing of the currents of Block Island Sound. (Swanson, November 11, 1981, pp. 3-127-129). In concert, these factors link Block Island to the indentation rather than to the open sea, and cause the indentation to have more than one mouth.

If a bay closing line is to be drawn to Block Island, the waters landward of that line must be landlocked by virtue of Article 7. That term is left undefined by the Convention, and commentators prior to this litigation had developed only subjective definitions.³ Indeed, two commentators have noted an apparent conflict within Article 7. They state:

In nature, bays may have all types of shapes, except those which are truly geometric (nature is said to abhor straight lines). For the sake of discussion, however, the shapes may be compared to semi-circles, triangles, squares, rectangles, etc. Most bays fall into the first two categories. In the case of semi-circles, it has been noted that this shape represents an absolute minimum condition.

³The Master's Report accurately reflects the comments of various treatises. (Report, p. 51-52, n.40).

In fact, we do not believe that a true semi-circular bay would contain land-locked waters.

Hodgson and Alexander, Towards An Objective Analysis of Special Circumstances, Occasional Paper No. 13, University of Rhode Island (1972), p. 8 (U.S. Exhibit No. 40) (emphasis added).

This Court has previously considered the problem presented by the Article 7(3) reference to multiple mouths "because of the presence of islands."

In the context of an island intersected by a mainland-to-mainland closing line the Court wrote:

Just as the 'presence of islands at the mouth of an indentation tends to link it more closely to the mainland,' so also do the islands tend to separate the waters within from those without the entrances to the bay. Even waters which would be considered within the bay and therefore 'land-locked' in the absence of the islands are physically excluded from the indentation if they lie seaward of the mouths between the islands. It would be anomalous indeed to say that waters are part of a bay even though they lie outside its natural entrance points.

United States v. Louisiana, 394 U.S. at 58.

The court also considered, without deciding, the relevant factors to be considered when an island lies wholly *landward* of a closing line.

By inference, the quotation above supports drawing a closing line to Block Island from Montauk Point and Point Judith. For a seaward island tends to link waters otherwise outside a bay to the waters within an indentation. Aaron Shalowitz, Shore

and Sea Boundaries, p. 225, n.38 (1962), cited in *Louisiana* at 57, n.78, posited drawing closing lines to seaward islands, subject to the rule of reason.

This Court has previously recognized that "there could be islands which would not, whether because of their size, shape, or relationship to the mainland, be said to create more than one mouth to the bay." 394 U.S. at 58. That hypothesis, of course, is forever linked to whether the area behind closing lines drawn to the island(s) is landlocked. Mr. White, an expert witness presented by Rhode Island, developed an objective test to determine this point which takes into *precise* account the concerns expressed by the Court above. The test is fully explained in the transcript and is fully illustrated in the exhibits both in the abstract and with relation to Block Island, in its actual and a notional position. (White, November 11, 1981, pp. 164-166, B-1 to B-18, C-54-59. R.I. Exhibits 21, 22 1(c), 1(d), 1(e) and 1(f).) The Master's Report adequately explains the test, yet as with any novel approach to a problem, an explanation often serves only to confuse (Report, p. 56, n.42). The geometry is simple once the principle is understood.⁴

Given the summary dismissal of Mr. White's proposition by the Master, Rhode Island is not sure that the Master understood the proposition. The test is certainly every bit as reliable as the various objective tests used to determine natural entrance points. The waters of Block Island Sound closed by a line from Montauk Point to Lewis Point and a line from Sandy Point to Point Judith are landlocked under the White test. Their sum length is less than 24 miles.

In the absence of Block Island, Rhode Island would be without authority to draw a direct closing line from Montauk

⁴A full understanding of the test, should it be unclear, is perhaps best left to oral argument or a further brief prompted by questions from the Court.

Point to Point Judith.⁵ Article 7(3), however, is not limited in its application to indentations which would not be bays but for the presence of an island. Once the Block Island Sound — Long Island Sound configuration is determined to constitute an indentation, and all waters behind plausible closing lines⁶ to Block Island are held landlocked either by the particular circumstances of Block Island or the White test, the selection of closing lines across those mouths are required by Article 7 just as surely as this Court held closing lines to headlands on an intersected island “not optional” in *Louisiana*. 394 U.S. at 57, n.77.

Conclusion.

The juridical bay formed by Long Island Sound and Block Island Sound is properly closed by lines drawn from Montauk Point on Long Island to Lewis Point, Block Island and Sandy

⁵Under the Convention a line could properly be drawn to the Point Judith harborworks. Convention, Article 8.

⁶Point Judith is certainly a plausible natural entrance point. It is one entrance point to Narrangansett Bay. It is the most prominent promontory along the south coast of Rhode Island in terms of visibility, length, departure from the general direction of the coast and usefulness to the coastal navigator. Further, the line from Sandy Point to Point Judith meets the forty-five degree test.

Point, Block Island to Point Judith, Rhode Island. The territorial waters of the United States are measured from this baseline.

Respectfully submitted,
DENNIS J. ROBERTS II,
Attorney General,
State of Rhode Island,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400
J. PETER DOHERTY,
Special Assistant Attorney General,
RFD Hawkseye Farm,
Sharon Springs, New York 13459.
(518) 284-2147

Appendix A.

Juridical Bay Discussion.

Article 7.

1. This article relates only to bays the coasts of which belong to a single state.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

MAY 10 1984

WALTER L. STEVENS
CLERK

IN THE
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

*Plaintiff,**v.*STATE OF MAINE, *et al.*
(RHODE ISLAND, NEW YORK),*Defendants.*

**EXCEPTIONS AND BRIEF OF THE
STATE OF NEW YORK**

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney for the
State of New York*
2 World Trade Center
New York, New York 10047
(212) 488-5123

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

JOHN G. PROUDFIT
Assistant Attorney General
Of Counsel

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No. 35 Original

IN THE
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.* (RHODE ISLAND, NEW YORK),
Defendants.

**EXCEPTIONS AND BRIEF OF THE
STATE OF NEW YORK**

Introduction

The issue to be decided in this Supreme Court original jurisdiction special proceeding is the location of the legal coastline of the United States in the area of the eastern end of Long Island Sound and in Block Island Sound. The determination of the issues are significant to New York because it will affect the location of New York's coastline and the State's jurisdiction over waters in Block Island Sound. A resolution of the area of jurisdiction will also affect the imposition and enforcement of certain of New York's fishing laws and pilotage law in Block Island Sound.

This supplemental proceeding arose out of the decision by the United States District Court in *Warner v. Replinger*, 397 F. Supp. 350 (D.R.I. 1975) and the subsequent affirmance by the First Circuit in *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). In *Warner*, several plaintiffs who were licensed by Connecticut as pilots of foreign flag and American registry vessels challenged the Rhode Island statute which required that foreign vessels and American vessels, under registry for foreign trade, that transverse the waters of Block Island Sound have a pilot licensed by the Rhode Island Pilotage Commission. In rejecting the plaintiffs' claim, both courts found that Long Island Sound and Block Island Sound was a bay in accordance with the requirements of the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. 5639 (hereinafter "Convention"). Since the courts determined that Block Island Sound was a bay, they concluded that the Rhode Island statute was valid pursuant to 46 U.S.C. § 211, which authorizes states to regulate pilotage "in bays, inlets, rivers, harbors, and ports of the United States. . . ."

A petition for a writ of certiorari was filed in the *Warner* case and is still pending. However, the United States urged that because a final decision as to the nature of Block Island Sound would determine the coastline in that area, the proper proceeding for determination of the "bay" issue should be in *United States v. Maine, et al.*, No. 35 original, the proceeding which established the coastline and the territorial sea of the states on the eastern seaboard.¹ This

1. The legal coastline (also referred to as the baseline) is the measuring point for the territorial sea. The United States recognizes a three mile territorial sea. Pursuant to the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, the three mile territorial sea comes under the jurisdiction of the coastal state.

Court agreed to the United States request and this supplemental proceeding was instituted. United States Senior District Court Judge Walter E. Hoffman was appointed Special Master on June 29, 1977.

The State of New York did not participate in the early stages of the supplemental proceeding, but subsequently did so after further consideration of the issues and their potential impact upon the State's interest. New York participated in the evidentiary hearings in Rhode Island and Norfolk, and offered testimony of two expert witnesses and the deposition of a third witness.

The Master issued his Report on January 13, 1984. He concluded that Long Island Sound and part of Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island is a juridical bay under the terms of Article 7 of the Convention. He further concluded that pursuant to the Convention this juridical bay should be closed by a baseline running from Montauk Point on Long Island north to Watch Hill Point, Rhode Island.

Exceptions

The State of New York excepts to the following findings and conclusions in the Master Report:

1. The waters east of a line between Montauk Point and Watch Hill Point are not landlocked (Master's Report, p. 59).
2. Watch Hill Point is the first prominent point on the Rhode Island Coast and marks the separation between the waters within the indentation and the waters outside the indentation (Master's Report, p. 59).

3. If the closing line included Block Island, there would be waters inside the closing line which are not landlocked (Master's Report, p. 60).
4. The natural entrance point to the indentation constituted by Long Island Sound and Block Island Sound is along the Montauk Point to Watch Hill Point line (Master's Report, p. 60).
5. Block Island does not form the mouth to the bay to the west or cause the bay to have multiple mouths (Master's Report, p. 60).
6. Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island (Master's Report, p. 60).
7. The legal coastline in the disputed area includes a closing line between Watch Hill Point, Rhode Island and Montauk Point on Long Island (Master's Report, p. 61).

Summary of Argument

The Master correctly concluded that Long Island Sound is a juridical bay pursuant to the provisions of Article 7 of the Convention. New York, however, contends that the facts, the terms of the Convention, and the legal interpretation of the Convention establish that the juridical bay should include all of the waters of Block Island Sound.

The waters of Block Island Sound meet the traditional purposes of a bay under international law, as well as the requirements for a juridical bay set forth in Article 7. The

waters are protected and landlocked and are not factually or legally different from the waters in Long Island Sound. The geographic features and the location of Block Island causes this juridical bay to have one primary entrance.

The closing line proposed by the Master between Montauk Point and Watch Hill Point is an arbitrary line which in fact and in law does not separate bay waters from sea waters or correctly close the area of the bay. The proper base closing line, in accordance with the requirements of Article 7 of the Convention (paragraphs 3 and 4), should be drawn from Montauk Point, Long Island to Block Island and Point Judith, Rhode Island to Block Island.

Article 7 of the Convention on the Territorial Sea and Contiguous Zone

1. This article relates only to bays the coasts of which belong to a single State.
2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of

the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

ARGUMENT

Pursuant to the Terms of Article 7 of the Convention, the Juridical Bay Constituted by Long Island Sound Should Include Block Island Sound, and Be Closed by Base Lines from Montauk Point and Point Judith to Block Island.

As recognized by the Master and all of the parties, a determination of the issue here rests upon the proper application of Article 7 of the Convention. As in other coastal disputes, the Court is called upon to apply international law

as well as Federal law to this domestic controversy. As stated by this Court in *United States v. Louisiana*, 394 U.S. 11, 77 (1969), concerning the historic bay principal under the Convention, "the only fair way" to apply the Convention is to consider the opposing claims as if they were being made between equally sovereign nations.²

The Juridical Bay

In applying the Article 7 criteria to Long Island Sound the Master correctly determined that Long Island Sound is a juridical bay. In making this determination he recognized the obvious geographic features of the area and Long Island's relationship to the mainland, and applied the provision of the Convention in accordance with the decisions of this Court. The Master, however, was in error in his application of the Article 7 criteria to the eastern part of Block Island Sound and Block Island and the relationship of that area to the juridical bay which he found to be present.

As noted by the Master, Article 7 sets forth three criteria for determining the existence of a bay: (1) a well-marked indentation constituting more than a mere curvature of the coast; (2) the area of the indentation must be "as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation"; (3) the waters must be landlocked. These three criteria were found by the Master to be applicable to the

2. In applying the Convention, this Court has shown deference to the United States in only one respect, and that involved a purely policy choice not to draw straight base lines pursuant to Article 4 of the Convention, an issue which is not present here. *United States v. Louisiana*, 394 U.S. at 72; *United States v. California*, 381 U.S. 139, 168 (1965).

waters in Long Island Sound and Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island, but not to the rest of Block Island Sound. Contrary to the Master's analysis and conclusion, however, each of the three criteria also apply to the portion of Block Island Sound east of the Montauk to Watch Hill line.

1. The Indentation

The first and most way of determining the existence of an indentation is to examine the area as represented on a nautical chart (see: Appendix B, Master's Report; N.Y. Exhibit 10). An examination of such a chart will show a very pronounced and deep indentation beginning at approximately Throgs Neck at the western end of Long Island Sound. This indentation clearly extends east to Montauk Point as the obvious entrance point on the southernmost side of the bay. On the northside, because of the location of Block Island, one may also ascertain that there is a primary entrance to the indentation between Block Island and Point Judith, Rhode Island, which would place the northernmost entrance point at Point Judith. There is also a secondary entrance to the bay between Montauk Point and Block Island.

The nautical charts show the shallow depth and underwater obstacles between Montauk Point and Lewis Point on Block Island. Rhode Island's witness, an experienced professional pilot, Captain John Neary, testified that this underwater line would have an effect on the sea in storm conditions and "knock down the swell." Neary, November 13, 1981, pp. C-109, 119. He also noted that the chart indicates that the seas break in heavy weather at Southwest

Ledge. Neary, November 13, 1981, p. C-119; U.S. Exhibit M-1.

Professor Jean Gottmann, Professor of Geography at the University of Oxford in England, noted the lesser depths, rocks and boulders lying between Montauk Point and Block Island which he considered a linking under the sea and evidence of Block Island being a part of the same terminal moraine which formed Long Island. Gottmann, January 11, 1982, pp. 47-49.³ Because of the difficulty imposed on navigation in the area between Montauk Point and Block Island, commercial ships use the entrance to Block Island Sound which lies between Block Island and Point Judith. Neary, November 13, 1981, p. C-92.

The Master's conclusion (Report p. 59) that the Baseline Committee was correct in finding Watch Hill Point as the first prominent point on the Rhode Island coast overlooks the fact that the prominent point which should be considered is that which is located in the area of the natural entrance, in this case Point Judith.⁴ The Master's further conclu-

3. Professor Gottman testified that,

"Block Island, in obvious fashion, belongs to the same system of deposits brought by the ice sheets from the continent. There was a linkage between Montauk Point, or the easternmost peninsula—if I may again show on the map with my stick—between Montauk Point here and Block Island that can be easily observed from the depths along the line that one can trace from Montauk Point to about Lewis Point on Block Island." Gottman, January 11, 1982, p. 47.

4. The Baseline Committee was a creation of the Federal Government to establish the location of the coastline in the first instance. This determination by "mid-level bureaucrats" (testimony of United States Witness Hugh J. Dolan, November 9, 1981, p. 70) who served

(footnote continued on next page)

sion that Watch Hill "marks the separation between the waters within the indentation and the waters outside the indentation" is not supported by the evidence. The evidence shows that the waters of Block Island Sound are sheltered by Block Island and the underwater obstructions, and that an artificial line between Montauk Point and Watch Hill Point would not in reality divide waters having the characteristic of a bay from those having the characteristic of open seas.⁵

The Master, in viewing Block Island Sound, failed to observe the concept in international law which permits the closing of a bay. That concept, which is undisputed in the record, holds that a bay may be closed because the waters are closely related to the mainland and that travel through these internal waters is not necessary for international passage. Professor Myers S. McDougal, January 11, 1982, pp. 41, 46; Professor Derek W. Bowett, November 11, 1981,

on the Committee is only entitled to the evidentiary weight given to opinions offered on behalf of any interested party.

A contrary opinion was offered by Commander White,

"... Point Judith is a reasonably well-pronounced point in relation to the line of the coast from Watch Hill coming out to Point Judith and then returning towards Narragansett Bay and the coast generally going along, a sort of front of those islands. I consider it myself to be quite a well pronounced point." White, November 11, 1981, p. B-69.

5. Captain Neary testified that in his opinion "Long Island Sound, Fishers Island Sound, Block Island Sound, Gardiners Bay are all one body of water." Neary, November 13, 1981, C-117.

Captain Neary also testified to the shelter that Block Island would provide depending upon the direction of the wind. Neary, November 13, 1981, C-109, C-119-121.

See also testimony of Captain Neary relating to the effect of the underwater obstructions between Montauk Point and Block Island previously referred to at p. 8 of our brief.

pp. 72-73; see also McDougal "*The Public Order of the Oceans*", pp. 341-349.⁶

The Master found that the evidence of the states' jurisdiction over Block Island Sound was insufficient to support an historic claim. In doing so, he failed to recognize that the evidence of jurisdiction which he rejected does establish that these waters fulfill the international purpose of a

6. Professor McDougal, Sterling Professor of Law Emeritus at Yale Law School and Visiting Distinguished Professor of Law at New York Law School, testified that "It has always been the law that a state may control the access to its internal waters. States don't have to open their harbors, don't have to open their ports. In the inland waters the State can bar, can preclude this transport from external sources." McDougal, January 12, 1982, p. 42.

Professor McDougal also referred to language in the *North Atlantic Fisheries Arbitration* (Scott, *The Hague Law Reports*, Volume IV, p. 141) decided in 1911 as an example of the concept of bays in international law,

"[T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline." McDougal, January 12, 1982, p. 45.

Professor McDougal also pointed out that the framers of the Convention were of course familiar with the concept of bays under international law;

"[T]he people who framed this 1958 Convention knew this history, and what they were trying to do was to give the coastal state enough authority and enough control over these closely proximate water to protect itself, to serve its internal interests at the same time without any great impairment of the ocean freedoms." January 12, 1982, p. 46.

The United States witness, Professor Bowett, testified that,

"[T]he original justification for treating a bay or internal waters was that vessels navigating along the coast need not enter into those waters, they would navigate as it were beyond the mouth of the bay and it was that that provided the justification for the coastal state treating the bay as internal waters." Bowett, November 11, 1981, pp. 72-73.

bay. The evidence established that the waters of Block Island Sound have one of the prime characteristics of a bay in that they do not constitute a route of international passage. Neary, Nov. 13, 1981 at C-88-91; Master's Report, pp. 46-47. In addition, these waters are closely related to the mainland by the intensity of their use for fishing, "sports" boating and the passage of commercial boats. Gottmann, January 12, 1982, pp. 50, 91; see also McDougal, January 12, 1982, pp. 46-47.

The evidence further demonstrated: (1) that New York and Rhode Island have laws requiring licensed pilots to be used by foreign vessels and American vessels involved in foreign trade in transiting Block Island. (*New York Navigation Law* § 89-b; R.I. Gen. Laws § 46-9.1-1. *et seq.*); (2) that Congress recognized and approved the boundary between New York and Rhode Island in Block Island Sound. H.R.J. Res. 138, 58 Stat 672 (1944); and, (3) that New York regulates fishing in its portion of Block Island Sound. Christ, Jan. 25, 1982 (Deposition). It is, therefore, clear from the evidence that the purposes and characteristics of a bay which are found in Long Island Sound are also present in Block Island Sound.

2. The Semi-Circle Test

The semi-circle test requires that the water area of a bay exceed the area of a semi-circle whose diameter is equal to the distance across the mouth of the bay. The parties have stipulated that the distance between Montauk Point and a point southwest of Southwest Point on Block Island is 13.8 nautical miles and that the distance between Point Judith, Rhode Island to Sandy Point, Block Island is 8.3

nautical miles. Attachment II, p. 67, Master's Report. It is obvious from viewing any nautical chart showing Long Island Sound and Block Island Sound that because of the vast amount of water contained therein, any closing line of 24 nautical miles or under would easily satisfy the semi-circle test of Article 7, and the Master so found. Master's Report, p. 49.

3. Landlocked

The Master concluded that the waters east of a line between Montauk Point and Watch Hill Point are not landlocked. Master's Report, p. 59. The Master's conclusion was made in the face of clear evidence to the contrary, including an objective test which he rejected without giving any reason for doing so. Master's Report p. 56 n. 42.

The objective test for landlockedness was set forth in the testimony of Rhode Island's witness, Jeremy C.E. White, Hydrographic Officer of the Port of London Authority, who as a Commander in the Royal Navy had actual experience in delimitation of territorial seas on nautical charts. White, Nov. 12, 1981, pp. 133-4. White's test for determining when a body of water is landlocked is based upon the observation that at any point a ship first crosses the entrance to a bay a minimum of 180° of land will be visible if one were to look in every direction. White thus concluded that landlocked waters require that any point on such waters be able to satisfy the minimal 180° of visible land. He applied this test to Block Island Sound and found the waters to be in fact landlocked. White, Nov. 12, 1981, pp. B-8, 13; RI Ex. 1(d)(e)(f).

The significance of White's analysis is not that it is his test, but that: (1) the minimum of 180° of visible land is a reasonable criteria; and (2) this criteria can be mathematically measured with respect to any point within a bay.

One of the characteristics of landlocked waters is that they provide shelter and isolation from the sea. Robert Hodgson and Lewis Alexander, *Towards an Objective Analysis of Special Circumstances*, Occasional Paper No. 13, U.S. Ex. 40 at p. 8. As we have previously noted the evidence at the trial demonstrated that Block Island and the obstacles and obstructions underwater between Montauk Point and Block Island dissipate the storm effects of the open sea located outside of Block Island Sound. Neary, Nov. 13, 1981, pp. C-109, 119; see also testimony that Block Island and obstacles affect the tide. Swanson, Nov. 11, 1981, p. 3-128, 9.

The shape of this juridical bay is not that of the more commonly visualized bay having arms of approximately the same length. For this reason the Master failed to appreciate that the arm to the north, the Rhode Island coast, provides closure and protection to the waters of Block Island Sound, and that Block Island provides the necessary additional closure and protection sufficient for these waters to be considered landlocked.

The Closing Lines for the Juridical Bay

Since the facts demonstrate that the juridical bay encompasses the waters of Block Island Sound and that the primary entrance lies between Block Island and Point Judith, the Master should have utilized Block Island in

closing the bay pursuant to the applicable language in paragraphs 3 and 4 of Article 7. Paragraph 3 states in part:

"Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths."

and paragraph 4 states:

"If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."

It is obvious from viewing the area that the most southern entrance point for the bay should be located at Montauk Point. As we have previously shown, the indentation extends to the area between Block Island and Point Judith. Thus the most northern entrance point should be located at Point Judith, which is also a prominent point on the Rhode Island coast and marks the entrance to Narragansett Bay.

Although a straight line from Montauk Point to Point Judith would also close the bay,⁷ the proper closing lines under the Convention, as well as the more logical ones,

7. The parties have stipulated that the distance between Montauk Point and Point Judith exceeds 24 miles by 2 to 3 tenths of a mile, but that the distance from Montauk Point to Point Judith harbor works is under 24 miles. Attachment II, p. 67, Master's Report. The United States' own witness Robert Smith testified that harbor works can be used as a headland for a bay. Smith, Nov. 10, 1981 at 130; see also Article 8 of the Convention and Gottman, Jan. 12, 1982, 55, 69-70. Although such a line would not conform to the 45° angle, this is not relevant for three reasons: 1) the 45° rule is not imposed by the Convention; 2) the 45° rule is not applicable because Point Judith is not a point on a featureless coast but a prominent point; 3) the 45° rule is not applicable because the proper closing line utilizes Block Island and not Montauk Point to Point Judith.

would utilize Block Island.⁸ Article 7(3) of the Convention permits a closing line to be drawn to an island "where because of the presence of islands, an indentation has more than one mouth." Here, as we have shown, Block Island causes the indentation to have more than one mouth so that the closing lines should be drawn to Block Island.

Block Island also causes the bay to be more landlocked than it would otherwise be. The Commentary of the International Law Commission states with regard to Article 7(3) that, "the presence of islands at the mouth of an indentation tends to link it more closely to the mainland." Report of the International Law Commission Covering the Work of the Eighth Session (1956) 2 Y.B. Int'l L. Comm'n 269 U.N. Doc. A/CN.4 (1956). As we have pointed out previously, the fishing and boating activities in Block Island Sound indeed relate to the mainland.

The United States has argued in this proceeding that in order for an island to be utilized in drawing closing lines it must be intersected by a line which is drawn between the mainland headlands of the bay.⁹ There is no such requirement, either implicit or explicit, in Article 7, as noted by this Court in *United States v. Louisiana*, 394 U.S. at 59 n. 79,¹⁰ and we would suggest that the implication in Article 7(5) is to the contrary.

8. The parties have stipulated that the distance between Montauk Point and a point southwest of Southwest Point on Block Island is 13.8 nautical miles and the distance from Point Judith to Sandy Point on Block Island is 8.3 nautical miles. Attachment II, Master's Report, p. 67.

9. A line from Montauk Point to Point Judith Harbor works would pass to the west of Block Island.

10. ". . . Article 7(3) contains no requirement that the islands be intersected by a mainland-to-mainland closing line." *id.* n. 79 at p. 59.

One of the leading authorities recognized by this Court¹¹ in the area of coastline determination, Aaron Shalowitz, states in his book *1 Shore and Sea Boundaries* (1962) at 225 that a reasonable interpretation of the Convention is that closing lines should be drawn to a seaward island. Shalowitz points out that,

"The Basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland . . . It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible, and with par. 3 of the article which allows islands within an indentation to be considered part of the water area." *id.* at 225 n. 38.

The distance seaward an island may lie from a straight line across the entrance in order to be utilized for closing purposes is of course limited by two criteria in the Convention: (1) landlockedness, and (2) the maximum total length of 24 miles permitted for closing lines. Application of these two criteria to a seaward island will determine whether or not it may be utilized for the closing of a bay. These criteria insure compliance with the drafters' intent and preserve the integrity of the Convention provisions. Use of a seaward island is also, of course, consistent with paragraph 5 of Article 7, which indicates the intent, as pointed out above, to "enclose the maximum amount of water that is possible."

11. *United States v. Louisiana*, 394 U.S. at 57 n. 78.

In accordance with the terms of the Convention, Block Island should be utilized in drawing base closing lines for the juridical bay. Pursuant to the evidence, the lines should be drawn from Montauk Point to a point near Southwest Point on Block Island and Sandy Point on Block Island to Point Judith. White, November 12, 1981, p. B-73.

Conclusion

For the reasons set forth above, all of Block Island Sound constitutes a part of the Long Island Sound juridical bay, and the proper closing lines and base point for the territorial sea in the area at issue are a line from Montauk Point to a point near Southwest Point on Block Island and Sandy Point on Block Island to Point Judith.

Dated: New York, New York
May 4, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney for the
State of New York*

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

JOHN G. PROUDFIT
Assistant Attorney General
Of Counsel

JUN 7 1984

ALEXANDER L STEVENS
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.
(RHODE ISLAND AND NEW YORK)

ON REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
F. HENRY HABICHT, II
Assistant Attorney General
LOUIS F. CLAIBORNE
Deputy Solicitor General
MARGARET N. STRAND
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

**STATE OF MAINE, ET AL.
(RHODE ISLAND AND NEW YORK)**

ON REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

As we understand their submissions to the Court, the States of Rhode Island and New York have accepted the Special Master's finding (Report 19) that Block Island Sound does not qualify as an "historic bay." R.I. Br. 2; N.Y. Br. 11-12. Nor do the States now question the Master's conclusion (Report 28) that if Long Island is viewed as an island, no juridical bay exists in the disputed area. Accordingly, only two issues remain: (1) Should Long Island be treated as an extension of the mainland so as to form the side of a juridical bay? and (2) If so, what is the proper closing line of that bay? The

first question is the subject of our own Exception and has been fully argued in our opening brief. If we are right on that point, the case is at an end. The present brief addresses only the second question, in the event the Court disagrees with our primary submission that Long Island is an island in law as in fact.

On the assumption that Long Island is a part of the mainland mass, it is common ground that it forms a juridical bay—a bay we hereafter refer to as “Long Island bay,” which encompasses all of Long Island Sound and also some or all of Block Island Sound. It is likewise agreed that the southern headland of that bay is the eastern tip of Long Island, Montauk Point. What is disputed is how to draw the bay closing line from that point in a northerly direction to the Rhode Island mainland. Accepting arguendo that Long Island, juridically, is a peninsula, we endorse the Special Master’s resolution of the issue: a line from Montauk Point almost exactly due north to Watch Hill Point on the Rhode Island mainland. Report 49-60 & App. C. See also U.S. Br. 3a (chart 3). Although Rhode Island has listed 15 exceptions (R.I. Br. 2-4) and New York seven (N.Y. Br. 3-4), the States are essentially arguing that the closing line ought to proceed much more easterly from Montauk Point, to Block Island, and thence to Point Judith on the mainland. See Report App. C; U.S. Br. 2a (chart 2).

It is appropriate to deal with the question presented by the States’ Exceptions in two stages. First, ignoring Block Island, we ask where is the northern entrance point of the bay created by Long Island (treated as part of the mainland). After answering that inquiry, we turn to see whether the presence of Block Island alters the result.

A. The Normal Closing Line Of Long Island Bay

Since we are considering a juridical bay, it is clear that the question is governed by Article 7 of the International Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609 [hereinafter Convention], the text of which is reproduced in the Special Master's Report (at 20-21). That Article announces two kinds of criteria for a bay, the first visual, the second mathematical. We are not here concerned with the latter—the "semi-circle" test and the 24-mile rule—because it is agreed that they would be satisfied whichever of the proposed lines is chosen. But, of course, that is not enough. The Court has long since rejected the "argument that an indentation which satisfies the semi-circle test [and the 24-mile rule] *ipso facto* qualifies as a bay under the Convention." *Louisiana Boundary Case*, 394 U.S. 11, 54 (1969). A bay must also meet what we term the "visual" tests: it must be a "well-marked indentation," which is "more than a mere curvature of the coast," and it must "contain landlocked waters." *Ibid.*; see Convention, Art. 7(2). Nor do these requirements lose their relevance once it is determined that a true bay exists. As the Special Master recognized (Report 49-52), the visual tests also tell us where the bay begins and ends.

Thus, in this case, assuming there is a juridical bay between Long Island and the mainland to the north, we must still decide what are "the natural entrance points" of that bay, a line connecting which will define the limit of "internal" or "inland" waters. Convention, Art. 7(4). And, to make that determination, we will be applying a visual standard: at what points do the waters landward of a line drawn between them appear "landlocked" and within a "well-

marked indentation" and the more seaward waters seem outside the indentation and no longer landlocked? Given that the southern entrance point of the bay cannot be located more favorably than the tip of Montauk Point, the issue is where to place the "matching" entrance point on the northern mainland.

As it seems to us, a look at a chart of the area (*e.g.*, Report App. C) immediately answers the question in favor of the Special Master's choice, Watch Hill Point, and not Point Judith some eighteen miles to the east—or some point in between. That selection was endorsed (on the hypothesis that Long Island is an extension of the mainland) by the federal Baseline Committee (Hodgson Deposition, U.S. Exh. 63 at 7, 50; U.S. Exhs. 18-19) and by experts (Bowett Trial Transcript 41-43; Smith Trial Transcript 96). Watch Hill Point is, moreover, the nearest point on the opposite shore to Montauk Point and therefore satisfies the most appropriate of the objective criteria devised to aid in these determinations. See Hodgson Deposition 6-7; Report 50-51 n.39. But, at the end of the day, we cannot improve on the Special Master's statement in support of this solution (Report 59-60):

Montauk Point is one prominent point marking the separation between the waters within the indentation and the waters outside the indentation, and is the clear natural entrance point on the south side of the indentation. Watch Hill Point is the first prominent point on the Rhode Island coast, it is almost due north of Montauk Point, and it also marks the separation between the waters within the indentation and the waters outside the indentation, thus, Watch Hill Point is the logical natural entrance point on the north side of the indentation.

The parties agree that the waters on Long Island Sound are landlocked and it is clear that the waters west of a closing line between Montauk Point and Watch Hill Point are landlocked, while the waters east of this line are not landlocked. The waters east of Montauk Point and Watch Hill Point are exposed to the open sea on two sides and consequently are not predominantly surrounded by land or sheltered from the sea. Upon reviewing charts of the area, there is no perception that these waters are part of the land rather than open sea. Conversely, the waters west of Montauk Point and Watch Hill Point satisfy all the criteria for being landlocked. Long Island Sound and Block Island Sound west of Montauk Point and Watch Hill Point are surrounded by land on all but one side and are usefully sheltered and isolated from the sea. The waters west of a line connecting Montauk Point and Watch Hill Point are landlocked.

B. The Effect Of Block Island On The Bay Closing Line

The States pitch their case on the existence of Block Island. But it is plain, we submit, that the island is far too "isolated" to affect the definition of Long Island bay (assuming such a juridical bay, arguendo).

It is, of course, too late in the day to argue that an island "which cannot realistically be considered part of the mainland" may form a bay. *Louisiana Boundary Case*, 394 U.S. at 67. And, sensibly, the States make no such claim for Block Island, more than seven miles from the nearest mainland. See Report 67. But it is no more arguable that the closing line of Long Island bay ought to be deflected seaward because Block Island is so situated as to give the

indentation "more than one mouth." See Convention, Art. 7(3). Assuming a bay's seaward boundary should be bent outward (beyond the direct mainland-to-mainland closing line) where one or more islands obstructs the mouth of the indentation and "covers a large percentage of the distance between the mainland entrance points" (*Louisiana Boundary Case*, 394 U.S. at 58),¹ this is not remotely such a case. Here the island accounts for less than a quarter of the proposed closing line and lies more than ten miles seaward of the normal closure of the bay. See Report 60, 67 & App. C.

The States' somewhat original attempts to avoid the obvious result cannot avail. For instance, New York argues that all the waters of Block Island Sound should be considered part of a bay because they are put to the same purpose as "internal" waters, to wit, fishing and recreation, with little interruption by international traffic. N.Y. Br. 12. But, at best,

¹ This Court has not resolved the question, merely reciting Shalowitz' suggestion. See *Louisiana Boundary Case*, 394 U.S. at 57 n.78. Even Shalowitz noted, however, that using such an island "would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule." While he was of the view that a case by case application was best, he recognized that deflecting the closing line "only if some part of the island is on a direct headland-to-headland line", while more restrictive, "would also be in the interest of least encroachment on freedom of the seas." 1 Shalowitz, *Shore and Sea Boundaries* 225 n.38 (1962). To assure consistency, avoid ad hoc results, as well as protect the national interest in freedom of the seas identified by Shalowitz, the United States utilizes islands to form multiple mouths of a bay only when intersected by a mainland-to-mainland closing line. Smith Transcript 2-3, 2-4.

these facts are marginally relevant to an historic claim, now abandoned, or to a decision (reserved to the federal government) whether to invoke the straight-baseline option offered by Article 4 of the Convention. See *Louisiana Boundary Case*, 394 U.S. at 67-73. They have no place in determining the limits of a juridical bay under Article 7 of the Convention. Nor, indeed, is the absence of international traffic a unique characteristic of inland waters. As a consequence of the relative geographical isolation of the United States, many areas of territorial sea, even high seas, off the coast see no international shipping.

Rhode Island can fare no better in relying on non-geographical criteria, including vessel transit and the oceanographic traits of Block Island Sound. R.I. Br. 7-8. None of these factors are part of the Article 7 standards for delimitation of a bay, and they were properly rejected by the Special Master. Besides, if one were to stray from the geographical tests announced by the Convention, it would be difficult to ignore the views of the residents of Block Island, who are so far from considering themselves within the "landlocked" waters of Rhode Island that they are reportedly threatening total "secession." See *N.Y. Times*, May 30, 1984, at 1, col. 2.

In sum, the alternative closing lines presented by the States are not sustainable. If Long Island must be deemed an extension of the mainland creating a juridical bay, the natural entrance points of that indentation are found at Montauk Point and Watch Hill Point, as the Special Master found. That is what the map tells us at first glance and no number of words can alter this geographic reality.

For the reasons stated in our opening brief, the Exception of the United States to the Special Master's Report should be sustained. In the event the Court rejects that primary submission, the several Exceptions of Rhode Island and New York should be overruled and the Special Master's recommendations approved.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

MARGARET N. STRAND
Attorney

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CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.*
(RHODE ISLAND, NEW YORK),

Defendants.

ANSWER AND REPLY BRIEF OF THE STATE
OF NEW YORK TO EXCEPTION OF
THE UNITED STATES

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney for the
State of New York*
2 World Trade Center
New York, New York 10047
(212) 488-5123

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

JOHN G. PROUDFIT
Assistant Attorney General
Of Counsel

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IN THE
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.* (RHODE ISLAND, NEW YORK),
Defendants.

**ANSWER OF THE STATE OF NEW YORK TO
EXCEPTION OF THE UNITED STATES**

The State of New York denies the exception of the United States to the conclusion of the Special Master that Long Island can be treated as part of the mainland. New York further denies that the baseline urged by the United States is the proper closing line.

Respectfully submitted,

ROBERT ABRAMS
Attorney General

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No. 35 Original

IN THE
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF MAINE, *et al.* (RHODE ISLAND, NEW YORK),

Defendants.

REPLY BRIEF FOR THE STATE OF NEW YORK

Statement

This brief is submitted in response to the brief of the United States in support of its exception. The factual background and the issues involved are set forth in the introduction to the Report of the Special Master and in New York's brief in support of its exceptions.

A determination of the issues depends upon the proper application of Article 7 of the Convention on the Territorial Seas and Contiguous Zone. 15 U.S.T. 1607, T.I.A.S. 5639 ("Convention"). It is therefore significant that the Government's brief omits any reference to application of the

provisions of Article 7 to the sheltered waters north of Long Island which is the area at issue here. It is also significant that the Government argues that it is unnecessary to consider the bay-like appearance and use of these waters.

The Government essentially seeks to have the Court decide this proceeding by adopting a myopic view of the area involved. This view would take in only that Long Island is an island surrounded on all sides by water, and it would ignore the geographic reality constituted by the waters enclosed by that island.

Summary of Argument

In nature there are bays and there are islands, and one does not preclude the other. Likewise the Convention in Articles 7 and 10 considers the territorial sea as it relates to bays and to islands and these provisions are not mutually exclusive. An analysis of the history and purpose of Article 7 of the Convention and the application of its provisions to Long Island Sound inevitably leads to the conclusion that it is a juridical bay. Moreover, the evidence in the record clearly supports the conclusion of the Master that a juridical bay is present in accordance with this Court's view as expressed in *United States v. Louisiana*, 394 U.S. 11 (1969).

Long Island is a unique island, forming a large enclosed body of water. This body of water complies with the objective criteria for a bay as set forth in Article 7 of the Convention and it fulfills the historic characteristics of a bay under international law. The use of Long Island Sound relates to the mainland, and its waters do not serve as a necessary route for international passage.

Long Island by virtue of its size, its relation to the intervening waters, its proximate positioning to the mainland, its configuration with respect to the mainland, and its ties to the mainland, may realistically be considered a part of the mainland. As the Master found,

If there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it.¹

ARGUMENT

The Special Master Was Correct in His Conclusion That the Waters of Long Island Sound Are Encompassed Within a Juridical Bay.

The Government asserts in its brief that the Master's consideration of the "bay-like" appearance and usage of the waters sheltered by Long Island was backward, that his analysis should have started with Long Island as an island and with its relationship to the mainland.² This suggested approach is wrong logically, since the presence of an island by itself does not necessarily mean the existence of a bay. The approach is wrong legally since it ignores the criteria of Article 7 of the Convention.

Bay-Like Appearance

The logical first step in evaluating an area as a possible bay is to look for a geographic bay. Article 7(2) of the

1. Master's Report at 47.

2. United States' Brief at 8, 21.

Convention provides concise and objective criteria: (1) a well-marked indentation; (2) penetration in such proportion to the width of the mouth to contain landlocked waters and constitute more than a mere curvature of the coast; (3) the area of the indentation must be as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

The Master correctly applied each of the above criteria to the waters north of Long Island and found that the evidence established that the indentation satisfied the criteria. Indeed the Government concedes this, since its only exception is to the relationship of Long Island to the mainland. The Government relies solely upon a geographic view of Long Island, but deliberately chooses to ignore any geographic view of the indentation formed by that island. Since geography is a science which involves the natural features of the earth, there is no basis for such a feigned distinction. Whether one is a mariner or a layman, an examination of a nautical chart showing the waters north of Long Island will show an area having the geographic or natural features of a bay.³

Bay Use

The use and purpose of a bay is the basis for the concept in international law that a bay may be closed as internal waters. Article 7 of the Convention is founded upon this concept and it is central to any evaluation of a bay-like area. This concept is that a bay is an area closely related to the

3. For the convenience of the Court we have attached a portion of the Chart annexed to the Master's Report as Appendix B as our own Appendix A. We have highlighted the water area which New York considers to be a juridical bay.

coastal state and is not an area which is essential to international passage by ships of other states.⁴

The Master found, and the Government conceded, that Long Island Sound is used in accordance with expected use for a bay.⁵ The Government, however, asserts that the use as a bay merely stems from the United States' long-standing claim of "historic inland waters."⁶ There is *no* support for this assertion in the record; to the contrary, the evidence with respect to shipping, referred to by the Master,⁷ obviously relates to the enclosed nature of the waters of Long Island Sound and not to their designation as "historic inland waters."

The New York Court of Appeals, in *Mahler v. Transportation Company*, 35 N.Y. 352 (1866), noted the historic recognition accorded Long Island Sound as internal waters precisely because of the closed nature of its waters:

That Long Island Sound was included within the territorial dominions of the British Empire, at the date of the charter from Charles the Second to the Duke of York, is a proposition too plain for argument. It was an inland arm of the sea, washing no shores but those of the provinces, and with no opening to the ocean, except by passing between British headlands less than five miles apart. The right of the King depended on none of the vexed questions involved in the claims of dominion, by the English over the waters of the Channel, by the Turks over those of the Black Sea, by the Venetians over those of the Adriatic, or the Romans over

-
4. See New York's Brief in support of exceptions at 11 n.6.
 5. Master's Report at 46; United States' Brief at 22.
 6. United States' Brief at 21-22.
 7. Master's Report at 46.

those of the Mediterranean. It rested on clear and fundamental principles of international law. The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion.

Id. at 355 (citations omitted).

**Long Island Viewed as an
Extension of the Mainland**

The Master correctly found that under the law and the facts Long Island may be considered as an extension of the mainland. In *United States v. Louisiana*, this Court resoundingly rejected the claim being made here that an island may not form the side of a bay,

No language in Article 7 or elsewhere positively excludes all islands from the meaning of the "natural entrance points" to a bay. Waters within an indentation which are "landlocked" despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the "low-water mark around the shore" does not necessarily mean that the low-water mark must be continuous.

Id. at 61.

Here the narrow opening at Throgs Neck is not even into the sea, but into the East River and then into New York Harbor.⁸

8. The East River is not a true river, but a part of "a very complex estuarine system of the Hudson River". United States' witness Dr. Robert L. Swanson, Nov. 11, 1981 at 3-110; see also Gottmann, Jan. 11, 1982 at 57; Master's Report at 40 n.30.

This Court went on to say that,

[T]here is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold.

394 U.S. at 61-63 (notes omitted).

Long Island also is a unique island that in size and alignment to the mainland does not fit the usual mold of a coastal island.⁹

The issue which the Government focuses upon in its exceptions and brief arises from the Court's view in *United States v. Louisiana*, that Article 7 requires that in order for

9. At the hearing the Government introduced numerous charts of the Alaska coast and sought to argue the consistency that had been shown by the Government in drawing the territorial sea around various islands. U.S. Exhibits M.20-28. Aside from the fact that such lines were based upon a self-serving determination that has not been legally challenged, the islands in question were not comparable to Long Island, nor was the other island in the Persian Gulf shown on an additional chart also introduced at the hearing. U.S. Exhibit M.18. Now, apparently recognizing the invalidity of this argument, the Government seeks to rely upon the rejection of claims by Louisiana to mudlumps, to the Isles Deniers, Bonataria Bay, Bob Taylor's Pond, Zingin Bay and Riverside Bay. United States' Brief at 12-13, 14 n.7. We would suggest that a comparison of these islands to Long Island is even less relevant than those on the charts in evidence.

an island to form a bay it must be considered a part of the mainland:

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland.

394 U.S. at 67.¹⁰

10. Although the evidence of Long Island's relationship to the mainland is overwhelming, we urge the Court to re-examine the basis for the conclusion, that for an island to form a part of an Article 7 bay it must be considered a part of the mainland. We believe that an examination of the history of Article 7 will demonstrate that the correct way of determining the existence of a juridical bay is to consider the use of the waters involved and apply the Article 7 criteria. These criteria are clear, simple and all that are necessary. Such an approach would greatly simplify the job of a Special Master in deciding the issue and would restore the element of "common sense".

In reviewing the history of the Convention, we urge the Court to consider that the term "headland" is not used in the Convention and that "mainland" appears only in Article 11. The drafters of Article 7 obviously knew the meaning of these terms and chose to use "entrance points" connoting greater relationship to the water than to the land, and "coast" a broader term than mainland, and one which would include islands.

An earlier version of Article 7 used the word "inland" in relation to penetration,

For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion . . .

1 Y.B. Int'l L. Comm. 251, U.N. Doc. A/CN.4/SER.A (1955).

As we know, the final version of Article 7(2) does not include "inland."

The United States' delegation proposed an amendment to what ultimately became Article 3 that used the word "mainland":

Subject to the provisions of the present rules, the baseline is the low-tide line on the mainland. The baseline shall be marked on large-scale charts officially recognized by the coastal State.

U.N. Conf. on Law of the Sea (Official Records) Vol. III, 236 U.N. Doc. A/Conf. 13/39.

The comment with respect to this proposal was,

The word "coast" in the second clause is undesirable since the term was interpreted to include islands and drying rocks and

(footnote continued on next page)

In determining whether or not an island is related to the mainland, this Court suggested consideration of certain factors:

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its *size*, its *distance from the mainland*, the *depth and utility of the intervening waters*, the *shape* of the island, and its *relationship to the configuration or curvature of the coast* [T]he task [is one] determining . . . —in the light of these and *any other relevant criteria* and *any evidence* [*a Special Master*] finds it *helpful* to consider—whether the islands which [the coastal state] has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the “coast” within the meaning of the Convention on the Territorial Sea and Contiguous Zone.

Id. at 66 (note omitted) (emphasis added).

Evaluating Long Island on the basis of each of these factors, the Master correctly found that it may realistically be considered a part of the mainland. These factors demonstrate that:

shoals by the International Court of Justice in the Fisheries case [Judgment of 18 December 1951: I.C.J. Reports, 1951, p. 127]. Such a construction would give an unintentionally wide scope to the draft article.

Id. at 236 (emphasis added).

In commenting upon the United States proposal, the Yugoslavian delegate stated,

[T]he United States proposal involved a point of substance in so far as it referred to “the low-tide on the mainland”; it made no reference to islands, whereas the International Law Commission’s draft referred to “the coast” thereby covering both mainland and islands.

Id. at 140 (emphasis added).

- (1) Long Island by its large size forms a very long and large bay which dwarfs the waters of the East River which separate it from the mainland.
- (2) Long Island is separated from the mainland at Throgs Neck by a distance of approximately $\frac{1}{2}$ mile.
- (3) The depth of the intervening waters between Long Island and the mainland was increased to 34 feet by the Army Corps of Engineers in the 1800's to permit navigation by large vessels and the waters are utilized for commercial traffic, but not for international passage.¹¹
- (4) The shape of Long Island is a long projection of land protruding from the mainland to create an enclosure for the waters to the north.
- (5) Long Island's relationship to the configuration of the mainland on the opposite shore of Long Island Sound is basically parallel, forming an extended indentation.
- (6) The waters of Long Island Sound are protected and isolated from the sea and serve the boating needs of the people in the surrounding areas.
- (7) On a nautical chart or map one may observe the physical connections of Long Island to the mainland and the rest of New York City.¹²
- (8) Finally, the conceded evidence of political, economic and social interconnection between Long Island and the mainland and the rest of New York is overwhelming.¹³

11. The enormous task undertaken by the Corps is set forth in the *Cradle of the Corps* (U.S. Exhibit 47). This work in the Hell Gate section of the East River increased the depth from 18 to 20 feet to the present 34 feet and reduced the current from 10 to 5 knots, eliminating the extremely treacherous navigation in that area. (*Cradle of the Corps* at 69-75; Neary, Nov. 13, 1981, C-102-03).

12. There are a total of 10 bridges as well as 16 train, utility and water tunnels (New York Exhibit 13).

13. See, e.g., Gottmann, Jan. 11, 1982 at 33-39; United States Exhibit 60 at 13-26.

Common sense dictates what the facts and the law have established, that the waters enclosed by Long Island Sound constitute a bay. We ask only that the Court in reviewing the Master's conclusions give fair and realistic consideration to the facts and to the application of the law. We are confident that an objective and fair determination of this domestic dispute on the merits, unfettered by the Government's irrelevant and invalid protestations of patriotism, lofty doctrines, and suggestion of vague, unsupported international consequences, can only lead to the inevitable conclusion reached by the Master, that Long Island forms a juridical bay.

Conclusion

For the reasons cited in the Master's Report, in New York's brief in support of its exceptions, and in the brief herein, we respectfully ask the Court to affirm the Master's conclusion that the waters lying to the north of Long Island constitute a juridical bay.

Dated: New York, New York
June 8, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney for the
State of New York*

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

JOHN G. PROUDFIT
Assistant Attorney General
Of Counsel

APPENDIX

S TO NEW YORK

S TO FIVE FATHOM BANK

Mercator Projection

Scale 1:400,000 at Lat. 40°

North American 1927 Datum

OUNDINGS IN FATHOMS AT MEAN LOW WATER

(For offshore navigation only)

CAUTION

Temporary changes or defects in aids to navigation may be indicated on this chart.
See the Notices.

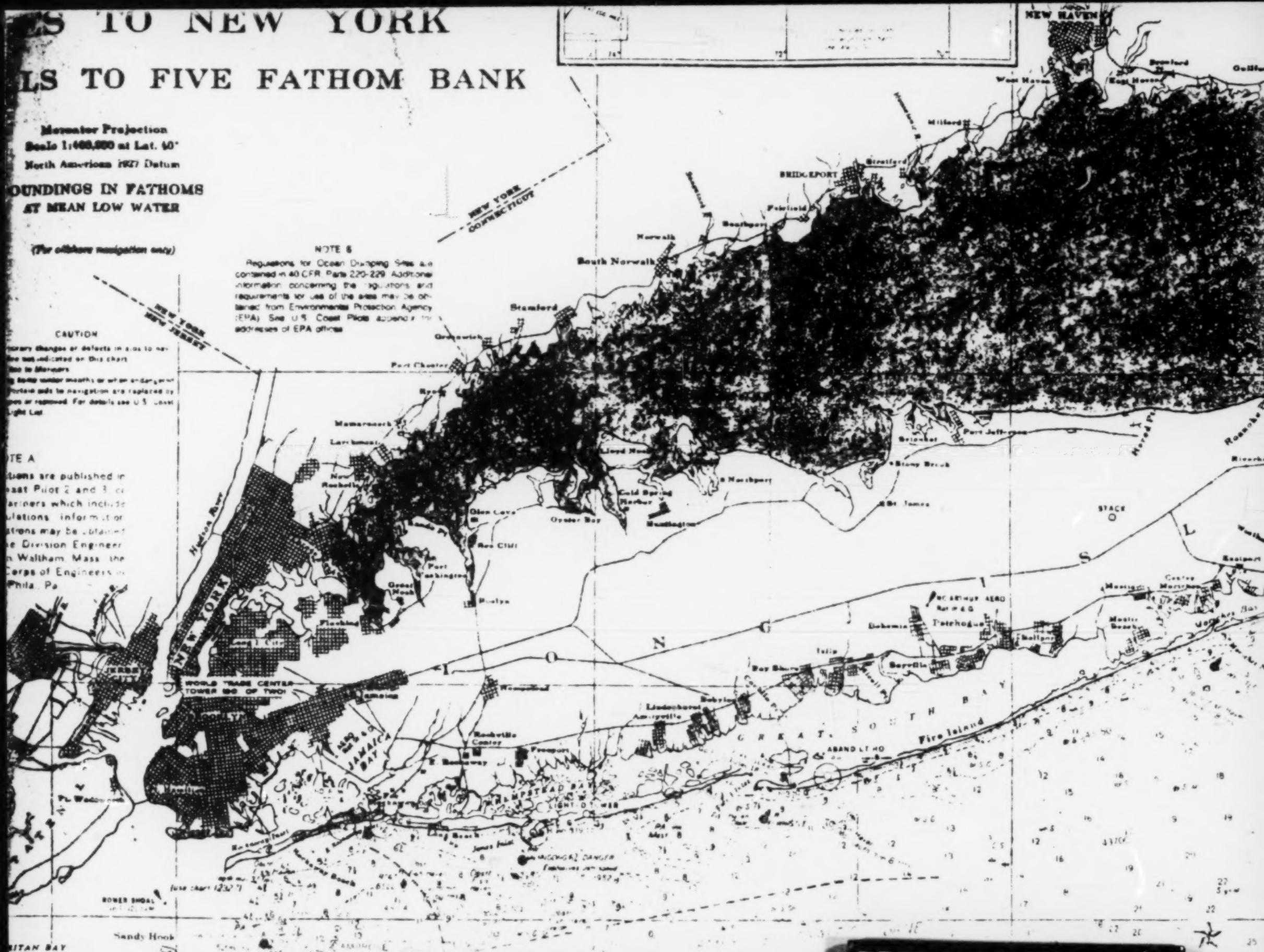
Any temporary marks or other aids to navigation are replaced by permanent marks or removed. For details see U.S. Coast Pilot Light List.

OTE A

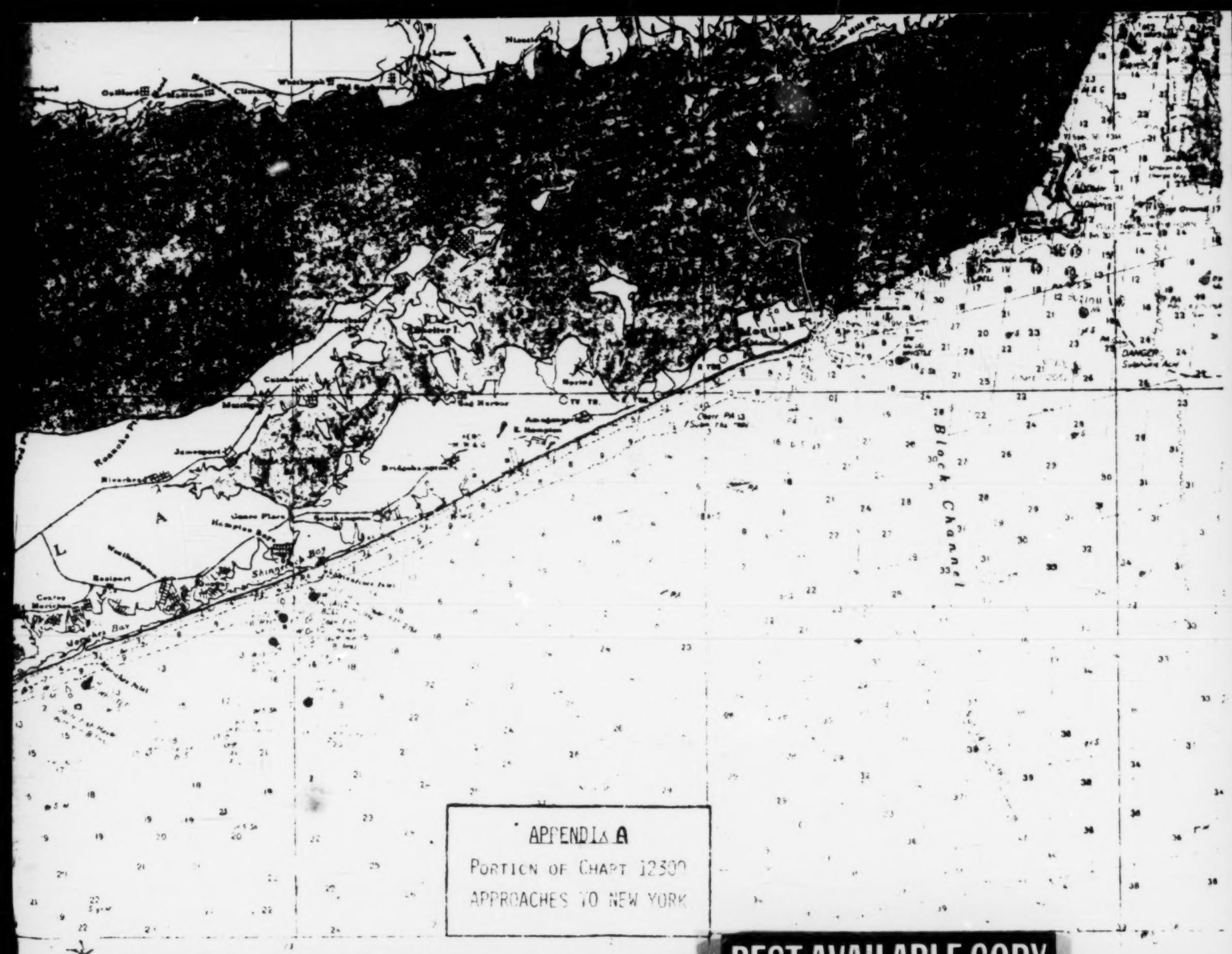
Information is published in Coast Pilot 2 and 3 or in Mariners which include publications. Information may be obtained from the Division Engineer in Waltham, Mass., the Corps of Engineers in Philadelphia, Pa.

OTE 6

Regulations for Ocean Dumping Sites are contained in 40 CFR Parts 220-229. Additional information concerning the regulations and requirements for use of the sites may be obtained from Environmental Protection Agency (EPA). See U.S. Coast Pilot Appendix IV for addresses of EPA offices.



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No. 35, Original

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF MAINE, ET AL. (RHODE ISLAND
AND NEW YORK), *Defendants*.

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

NORMAN C. GORSUCH

ATTORNEY GENERAL

G. THOMAS KOESTER

ASSISTANT ATTORNEY GENERAL

JOHN BRISCOE

DAVID IVESTER

WASHBURN & KEMP

A Professional Corporation

144 Second Street

P. O. Box 880130

San Francisco, CA 94188

Telephone: (415) 543-8131

Attorneys for the

State of Alaska

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

15pp

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OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

STATE OF MAINE, ET AL. (RHODE ISLAND
AND NEW YORK), *Defendants*.

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

INTEREST OF THE STATE OF ALASKA

The State of Alaska is before this Court in another action (*United States v. Alaska*, No. 84, Original) to determine the extent of the submerged lands owned by the State along its north slope. That action is currently scheduled to go to trial before the Special Master on July 16, 1984. Owing to the significant impact that the Court's decision and statements in this case may have on Alaska's case, the State has a substantial interest in the outcome of this proceeding and must contest certain arguments advanced by the United States that are perceived to be misleading or flawed.

INTRODUCTION AND SUMMARY

The United States confirmed in Alaska upon the State's admission to the Union rights equal to those enjoyed by most other coastal states in its offshore territory. Pub.L. 85-503, 72 Stat. 339 (1958). The United States has sued Alaska, in this Court's original jurisdiction, over those rights, and the case has been referred to a special master. *444 U.S. 1065*. As pleaded, the *Alaska* case concerns the northern seaward boundaries of the State of Alaska from Icy Cape, southwest of Point Barrow, to the Canadian border. The length of that segment of Alaska's coastline approaches that of California's coastline, which has been the subject of litigation in this Court since 1945. *See United States v. California, 447 U.S. 1 (1980)*.

The Alaska coastline question will be tried by the Special Master, as presently scheduled, beginning July 16, 1984. The Special Master's report will be tendered to this Court in due course thereafter. If history is precedent, one or both of the parties will except to the report, and the Court will be asked to adjudicate that coastline.

The national Government has been accorded in these cases exceptional deference¹—some would say inordinate deference—to the position it elects on the particular occasion to take. Given that fact, and given the pendency of the *Alaska* case, which raises questions that cross or run tangent to the question raised by the United States in its Exception in this case, Alaska desires to correct certain flawed or misleading points in that Exception lest they

¹Charney, "Judicial Deference in the Submerged Lands Cases," 7 Vand. J. Trans. L. 383 (1974).

go unquestioned now and cause unnecessary problems in the *Alaska* case.

First, we challenge the Solicitor General's casual suggestion that this case has "international implications." The case involves dividing natural resources between the federal and various state governments, which is a matter of domestic law. There is no question that the United States has rights over such resources vis-à-vis foreign nations under international law; whether such resources are exploited by the federal or state governments is a purely domestic concern of no consequence to foreign nations. The Solicitor General's suggestion to the contrary is simply an attempt to manufacture judicial deference where none is due.

Second, the Special Master mistakenly states in his report that the coastline of the Alexander Archipelago in southeastern Alaska has not been the subject of litigation. The Solicitor General understandably neglects to correct this error; thus we point out that this coastline was involved in the arbitration between the United States and Great Britain in 1903 regarding the boundary between Alaska and Canada.

Third, the Solicitor General employs the Equal Footing Doctrine to advantage in a rather simplistic fashion. We explore the argument to its logical conclusion. Under the suggestion of the United States, each of the coastal states would be entitled to a nine-mile band of submerged lands such as owned by Texas and Florida, obviating most or all of the submerged lands issues before the Court.

Fourth, to the extent that the United States may suggest that any territorial losses suffered by a coastal state as a consequence of the United States ratification of the 1958

Convention on the Territorial Sea and the Contiguous Zone are somehow validated by other territorial gains achieved under that treaty, we point out that the Constitution prohibits ceding the territory of a state by treaty. In the absence of action by the Congress as a whole, the territory of a state may not be disclaimed.

ARGUMENT

A. Division of the Submerged Lands Between the Federal and Various State Governments Is a Matter of Domestic Law Which Does Not Merit the Judicial Deference Reserved for Foreign Policy Matters

The Solicitor General understandably is concerned about the ramifications of this case on the case involving Mississippi Sound and on the case involving the north coast of Alaska. *See Exception of the United States*, p. 6. We are, obviously, no less concerned. But it is less than ingenuous of the Solicitor General to suggest that this Court's decision will have "international implications." *Id.*

The executive branch disclaimed such a possible international effect when the Submerged Lands Act was before Congress. In hearings before the Senate Committee on Interior and Insular Affairs, Jack B. Tate, Deputy Legal Advisor to the State Department, testified at length concerning the domestic nature of the Submerged Lands Act:

Mr. Tate. . . . We have taken the position that whether this exploration of the seabed is done by the Federal Government or the State governments is not a matter that is of international concern, nor is it a matter that, as far as I know, would conflict with any of our treaty obligations.

. . . .

Senator Cordon. The Chair would like to ask one question here for the purpose of clarification. Is the

Chair correct in the understanding that the witness has said in his answer to Senator Jackson that the utilization of the seabed for the purposes of extracting values therefrom on the Continental Shelf, which right has been proclaimed by the President, is a use of the seabed of the Continental Shelf with respect to which the matter of whether the use be limited to the Government of the United States or by transfer from the Government of the United States by any of the several States, is not in the opinion of yourself and of the Department, as you understand it, an international question?

Mr. Tate. The Chairman is correct in that statement.

.....
Senator Kuchel. So you would find no conflict between the traditional policy of the State Department and the paramount rights holdings in the Texas and Louisiana cases?

Mr. Tate. I am aware of none.

Senator Kuchel. If there is no conflict, then for the purpose of the committee in considering the claims of the States in these various bills, any action by Congress to restore or give to the States any or all of the paramount rights which the United States Supreme Court holds that the Federal Government has, would not in any respect violate the policy of the State Department.

Mr. Tate. That is correct. I assume that as far as our international relations are concerned, the United States could divide up with the States any rights which it had, and those rights would be certainly the traditional right to the 3 miles, plus the right to the Continental Shelf as set forth in the 1945 proclamation.

Senator Kuchel. And to the extent that the Court held in each of those cases that the paramount rights doctrine went considerable seaward of the 3-mile-belt?

Mr. Tate. Whatever the United States has as far as the international aspect is concerned, it may divide up with the States as it pleases.

Hearings before the Senate Comm. on Interior and Insular Affairs on S. J. Res. 13, 83d Cong., 1st Sess. 1066-1067, 1086 (1953).

This case, the *Mississippi Sound* case, and the *Alaska* case entail no more than the domestic division, between nation and state, of the continental shelf. The differences between what Congress has seen fit to confirm to the states by the Submerged Lands Act and what the Government has chosen to claim as territorial sea in its foreign relations are manifest. *United States v. Louisiana (Texas Boundary Case)*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). In those cases, the Court confirmed Congress' 9-mile grant of submerged lands to Texas and Florida on its Gulf Coast. The United States, of course, claims but a 3-mile territorial sea on those coasts. Similarly, Congress has granted Puerto Rico the submerged lands around that island to an extent of nine miles from the coastline, while the United States has maintained its policy of claiming a 3-mile territorial sea around the island. 48 U.S.C. § 749. As illustrated by these cases, the division of the submerged lands of the continental shelf between the federal and state governments is manifestly a domestic matter, independent of United States foreign policy.

B. The Coastline of the Alexander Archipelago was the Subject of the Alaskan Boundary Arbitration with Great Britain in 1903

While the Solicitor General understandably does not quarrel with the point, we would note a pronounced error in the Special Master's report which, if uncorrected, might be argued to have consequences in the *Alaska* case. In his Report, the Special Master writes on page 31:

The United States presented evidence of how coastal islands in other areas have been treated for baseline purposes to support its position that islands cannot generally be used to form bays and that the *Louisiana* exception is limited to its specific situation. One area cited by the Government is the southern coast of Alaska. . . . The southern coast of Alaska is made up of numerous coastal islands which the United States has *not* utilized to form judicial bays.²¹

The footnote then reads:

This portion of the Alaskan coastline has not been the subject of any litigation.

On the contrary, that portion of the Alaskan coastline has been the subject of the highest order of litigation. It was raised during the arbitration between the United States and Great Britain in 1903, concerning the common boundary between Alaska and Canada. There the United States, through its agent Hannis Taylor, asserted in the most vigorous way that the waters of the Alexander Archipelago, the very area of which the Special Master writes, contained no high seas. Proceedings of the Alaskan Boundary Tribunal, S. Doc. No. 162., 58th Cong., 2d Sess., Vol. VII, pp. 608-611 (1904). Mr. Taylor's unstinting logic and eloquence on behalf of the United States attest not only to the status

of the Alexander Archipelago, but to that of Stefansson Sound in Alaska, Mississippi Sound, and quite possibly Block Island Sound. (While we have not yet read the United States' disavowal of Mr. Taylor's authority to speak in the premises, given the imminence of the *Alaska* case and the Government's disavowal of the authority of other Government officials who have uttered similar principles over the course of our history, we will not be surprised to read of it.)

C. Application of the Equal Footing Doctrine in the Simple Manner Proposed by the United States Would Entitle All Coastal States to a Nine-Mile Band of Submerged Lands

We would make one observation of the facile assertion of the Solicitor General that Long Island cannot be considered an extension of the mainland because, "of course, the Equal Footing Doctrine prohibits disparate treatment of the States on this score." Exception of the United States, p. 7. Were that true, there would likely be no present case, no *Mississippi Sound* case, and no *Alaska* case. That would be so were all the coastal states held to own those same portions of the continental shelf as has been held by this Court to be owned by Texas and Florida—a nine-mile breadth off their Gulf Coasts. See *United States v. Louisiana (Texas Boundary Case)* *supra*, 363 U.S. 1; *United States v. Florida*, *supra*, 363 U.S. 121.

With such true parity in the division of the nation's continental shelf resources (this is, again, no case of American territorial claims, except as the United States may elect to apply the decision), boundary delimitation questions of the present sort are eliminated. The charts drawn by the

Solicitor General to accompany the Exception illustrate the result of such true parity. Were bands of nine miles' width drawn about each of the islands and along the coastline of Rhode Island and Long Island, it can be seen that the issue of the status of Block Island Sound would be moot. No closing lines would need to be drawn and the status of Long Island as an extension of the mainland would be irrelevant, because the resources of Block Island Sound would belong to the states under any theory.

D. Only Congress Has the Constitutional Power to Fix the Coastal Boundaries of the States; the Executive May Not Unilaterally or in Conjunction with the Senate Alone Disclaim State Territory

The United States may well suggest that any territorial losses a coastal state suffered by the United States ratification, and the entry into force, of the 1958 Convention on the Territorial Sea and the Contiguous Zone ought, psychologically at least, to be offset by territorial gains it assertedly realized thereby. This was its position before the Special Master in the *Mississippi Sound* case. The argument is, briefly, that certain American practices in maritime boundary delimitation that produced more territorial sea than is generated under the rules of the 1958 Convention became "outlawed" by the entry into force of the Convention. At the same time, the United States asserts, the states gained by such new rules as the 24-mile closing line for bays; previously, the United States asserts, it recognized only a 10-mile closing line.

This line of argument seems not to have been, to date at least, explored by the parties or the Master in the present case, but it is clearly joined in the *Alaska* case and in

the *Mississippi Sound* case. We hope to have our day before this Court on this assertion. But, in the apprehension that the Solicitor General's eloquence will win the point without proof, we offer the following observations.

Even if the entry into force of the 1958 Convention produced certain United States territorial gains benefitting the states, it does not follow that as a matter of domestic constitutional law, application of the Convention necessarily divests the states of Congressionally-granted submerged lands, belonging the day before to the coastal states.² Only the whole Congress can establish a state's boundaries, not the federal Executive with the advice and consent of the Senate alone ostensibly acting in the name of foreign relations. *United States v. Louisiana, supra*, 363 U.S. 1, 35. Such a rule would permit the national Government to disclaim the territory in question—vis-à-vis the states only—and thereby reserve for itself, through the wartime Truman Proclamation, the continental shelf resources of these newly disclaimed areas of "high seas." See Convention on the Continental Shelf, Article 2, 15 U.S.T. 471, T.I.A.S. 5578.

²For example, we will adduce evidence at trial that the United States assimilated "objectionable pockets of high seas" to the territorial sea prior to the entry into force of the Convention. The United States now asserts that the Convention compels the conclusion that such pockets are high seas and, as a result, outside state boundaries even when completely surrounded by submerged lands which, it is conceded, belong to the state. Similar evidence was presented in the *Mississippi Sound* case.

CONCLUSION

Whatever may be decided by this Court in this purely domestic controversy, the federal Government is free to go its own way in foreign relations. It may recognize territorial seas of 12 miles' breadth (as it has), or of two miles' breadth, and so forth. If this case has an "international aspect," it is only because the United States has preferred, for domestic reasons pertaining to the Submerged Lands Act, to give it one.

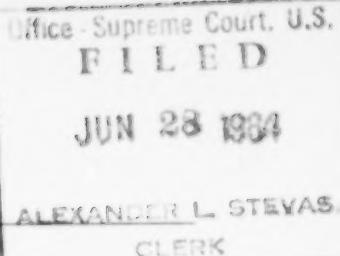
We note that the dispute which precipitated this case was pending upon a petition for writ of certiorari for eight years. *Ball v. Dunlap*, Docket No. 75-6990; Report of the Special Master, p. 2. In the circumstances, it may be appropriate to defer decision of the present case until the *Mississippi Sound* and *Alaska* cases have been fully tendered, on the reports of the special masters hearing those cases, to this Court.

Dated June 14, 1984

Respectfully submitted,

NORMAN C. GORSUCH
ATTORNEY GENERAL
G. THOMAS KOESTER
ASSISTANT ATTORNEY GENERAL

JOHN BRISCOE
DAVID IVESTER
WASHBURN & KEMP
A Professional Corporation
Attorneys for the
State of Alaska



No. 35, Original.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
(RHODE ISLAND, NEW YORK),
DEFENDANTS.

**Answer and Reply Brief of the State of Rhode Island to the
Exception of the United States.**

DENNIS J. ROBERTS II,
Attorney General,
State of Rhode Island,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

J. PETER DOHERTY,
Special Assistant Attorney General,
RFD Hawkseye Farm,
Sharon Springs, New York 13459.
(518) 284-2147

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DEFENDANTS.

Answer of the State of Rhode Island.

The State of Rhode Island denies the exception of the United States to the Master's conclusion that Long Island should be treated as part of the mainland under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. Additionally, Rhode Island denies that the baseline urged by the United States is correct.

Respectfully submitted,
DENNIS J. ROBERTS II,
Attorney General



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Reply Brief of the State of Rhode Island.

Introduction.

In its various briefs and oral argument before the Special Master, the United States repeatedly asserted that an Article 7 juridical bay cannot be formed between coastal islands and the mainland. Report of the Special Master, pp. 23, 30-32, 31, fn. 20. In its brief before this Court, the United States finally abandons that position for one which acknowledges the Court's general language in *United States v. Louisiana*, 394 U.S. 11 (1969) and yet construes it in an exceedingly narrow fashion.

The Special Master astutely reached this conclusion:

Long Island is so integrally related to the mainland that it should be considered an extension of the mainland. If

there is ever a situation where a large coastal island will be considered a part of the mainland so the water enclosed between the island and the coast can be a juridical bay, this is it.

Report, p. 47.

If the general language of *Louisiana* has any validity beyond that case, this Court after reviewing the factual record before the Master will certainly agree with the Master's finding on this point.

Argument.

THE GEOGRAPHIC, PHYSICAL, SOCIAL AND ECONOMIC TIES BETWEEN LONG ISLAND AND THE MAINLAND AND THE USES OF THE ENCLOSED WATERS BY MARINERS ESTABLISH LONG ISLAND AS PART OF THE MAINLAND UNDER ARTICLE 7.

It is a geographic fact that Long Island is, indeed, an island. Under Article 7, however, that does not end the analysis.

In *United States v. Louisiana*, this Court considered whether or not islands can be used as headlands of bays. The Court states:

No language in Article 7 or elsewhere positively excludes all islands from the meaning of the 'natural entrance points' to a bay. Waters within an indentation which are 'landlocked' despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the 'low-water mark around the shore' does

not necessarily mean that the low-water mark must be continuous.

Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been — and under the Convention certainly remains — that bays are indentations in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. But much of the Louisiana coast does not fit the usual mold. . . .

While there is little objective guidance on this question to be found in international law, *the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.* We leave to the Special Master the task of determining in the first instance — in the light of these and any other relevant criteria and any evidence he finds it helpful to consider — whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the ‘coast’ within the meaning of the Convention on the Territorial Sea and the Contiguous Zone.

United States v. Louisiana, supra at 61-66 (emphasis added) (footnotes omitted).

In Rhode Island's view other elements which help determine an island's relationship to the mainland are (a) the existence of man-made structures connecting the island to the mainland, (b) commercial and social interaction between the island and the mainland, (c) the origin and formation of the island and the contiguous mainland, (d) man-induced alterations of the intervening waters and (e) navigational use of the intervening waters.

Applying the Court's criteria and those suggested by Rhode Island to Long Island should easily lead this Court to the same conclusion reached by the Master. Ten bridges and sixteen train, utility and water tunnels connect Long Island to the mainland and parts of New York City. New York Exhibit 13. Long Island roughly parallels the mainland and encloses an area of water slightly smaller in area than the area of Long Island. Further, the ratio of the length of the channel formed by Long Island and the mainland to the distance between Long Island and the mainland is a large ten-to-one. White, Nov. 12, 1981, pp. 150-158. Thus viewed, Long Island encloses a body of water whose shape resembles a bay.¹

Additionally, Long Island Sound and Block Island Sound are not routes of international passage. As such, the waters are used as a bay. McDougal, Jan. 12, 1982, pp. 46-7; Neary, Nov. 13, 1981, C 88-C91. Long Island Sound is also part of the Hudson River estuary. Swanson, Nov. 11, 1981, pp. 3-106-3-109. Long Island and Block Island were formed by glacial action many centuries ago, and the depth of the intervening waters at the East River, and therefore the utility of those waters, was increased only after extensive work by the Army Corps of

¹ The United States belittles the Master's bay-like analysis as result oriented reasoning. At the same time, the United States recites the criteria of *Louisiana* and thereafter only argues that past decisions using the criteria have only looked favorably upon mudlumps and such. If nothing else, such analysis avoids the question.

Engineers in the last century. U.S. Exhibit 47. Finally, the East River is not a narrow opening to the sea. It passes into New York Harbor, an Article 7 bay recognized by the United States.

Certainly the geography of Long Island and its socio-economic relationship with the mainland is different from that of the Louisiana delta or the rock islands of Maine or Alaska. The application of generic criteria and judicial judgment to the facts at hand, however, render the resolution of this issue relatively simple. "Long Island is closely linked with the mainland; it is situated such that a body of water that resembles a bay is enclosed, and the enclosed body of water is used like a bay." Report, p. 47. To hold otherwise renders *Louisiana* meaningless.

Conclusion.

The Court should agree with the Master's finding that Long Island should be treated as part of the mainland forming an Article 7 juridical bay.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
State of Rhode Island,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

J. PETER DOHERTY.
Special Assistant Attorney General,
RFD Hawkseye Farm,
Sharon Springs, New York 13459.
(518) 284-2147